

## **WORK PERMITS AND VISAS – THAILAND’S ACHILLES’ HEEL BUILDING SKILLS AND CAPACITY IN THE ECONOMY; ENABLING COMPETITIVENESS; “DOING BUSINESS” ENHANCEMENTS; SUPPORTING THAILAND 4.0**

### **Control v 6.10**

Some aspects of Thailand’s Work Permit and Visa system go back, unchanged, some 45 years (to 1972). The foreign business community and the local business community, both of which frequently rely on foreign skills, have recommended for many years that major revisions to the system are necessary. Work Permits and Visas continue to be the single most referred-to irritant in doing business and disincentive to foreign investment.

The issue is not just about convenience or ‘ease of doing business’. The current policies and practices impede Thailand’s reputation as an attractive place to invest and are out of synch with more recent policies such as IHQ. The many FTAs (Free Trade Agreements) to which Thailand is a party require freer movement of goods and services (including data) and investment. Most if not all have chapters about freer movement of people because goods and services and investment need people to support the objectives. But the Work Permit & Visa regime impedes the full realisation of economic value from these FTAs. These outdated processes are time consuming and often expensive. The overall impact causes economic harm.

These issues are outside the scope of the World Bank’s ‘doing business’ criteria, but are captured by other rankings. Improvements in Thailand’s World Bank ranking may give the wrong impression that these Work Permit and Visa issues have been addressed.

In many cases, the process required for foreigners to gain permission to work and reside legally in Thailand is exceedingly complicated and requires excessive and ultimately unnecessary paperwork. A change of mindset is needed about the content, usefulness, and method of collecting required information, including a fundamental re-design of the system to eliminate duplication. The Smart Visa (which is a limited carve-out rather than a systemic change) may be a good way to kick-start some of the necessary changes. But even the Smart Visa retains some seemingly complicated procedures.

We believe that some senior government officials may not be aware of the problems and may not appreciate the harm caused.

Considering the shared vision for Thailand 4.0, a major uplift in the freer flow of skilled labour and an infusion of talent are needed, as are lower-cost and less labour-intensive administrative processes to accomplish these goals efficiently.

### **RECOMMENDATIONS SUMMARY – TWO GROUPS OF PEOPLE**

There are two groups of people: 1. Those not working in Thailand (Business Visitors); and 2: Those who need to live and work in Thailand (Employees and others).

## 1. NOT WORKING IN THAILAND – VISITING FOR BUSINESS PURPOSES

**Business visitors** who have no intention or need to take up local employment and who are not resident in Thailand. They come to Thailand for various business-related activities which could include attending meetings, seminars, or having business discussions or attending board meetings. In the generally understood and internationally accepted definition they are not ‘working’. However, under the very broad definition of ‘work’ which has been part of Thai law, in most cases these relevant activities would constitute ‘work’ and thus would currently require a work permit to be undertaken legally.

Not only does this generate unnecessary administrative overhead for government officials with no apparent benefit, it unintentionally casts legitimate business visitors to Thailand as law breakers and can impact the validity of travel insurance.

Please see five specific **recommendations** on p. 4 to change the meaning of ‘work’ and carry out related changes.

## 2. HAVING A THAILAND-BASED JOB - WORKING AND EMPLOYED LOCALLY

**Employees and others:** People who are employees of local companies (or local affiliates of multinational or other foreign companies), or who are owners of local businesses need to work and reside in Thailand. They are engaged in the generally accepted definition of “work”. For those in this category, the concept of a merged work permit and visa (eg to a ‘work visa’) would be an attractive and logical improvement. A separation into two categories for skilled and unskilled work would also be useful. In addition, the process of applying for and granting these work visas would need to be streamlined, not least by giving a single government agency full responsibility for the process, rather than requiring interaction with two completely separate (and often conflicting) bureaucracies (i.e. Immigration and Labour) as is currently the case.

Some fundamental changes to the structures of work permits and visas are recommended; as much as possible should be put on-line with the opportunity for process re-engineering which that affords, along with many items better to support overall objectives, including removing burdensome actions (a) through (q).

There are specific **recommendations** for each topic (a) through (q) on pages 5 – 14.

### **ADDRESSING GROUP 1: BUSINESS VISITORS**

***The definition of ‘work’ is too broad and is based on inappropriate principles.***

Whether a work permit application (WP-1 or WP-10) is required depends on whether ‘work’ is being done. Trying to support business engagement based on nebulous principles and definitions which produce grey areas and artificial distinctions is time consuming and costly. Interpretation principles are based on a 1972 law (over 45 years old) which was most recently incorporated into the 2008 Foreign Employment Act, such that the following activities were defined as ‘work’:

- (i) If physical effort or knowledge is required in order to complete such activity/task
- (ii) If it has little or no effect on the labour market in Thailand.

A Decree issued on 23 June 2017 (also known as the 'Management of Foreign Workers Ordinance' or 'Emergency Decree on Managing the Work of Aliens') made changes:

- i) Repealed the Foreign Employment Act
- ii) Continued the basis for the definition of work (see above) *but*, importantly made it narrower by requiring that the activity must be linked to activities conducted for the purpose of carrying on an occupation or undertaking a business.
- iii) With the aim of reducing human trafficking, greatly enhanced penalties for employers and employees – see Appendix 3 for original penalties from 23 June 2017. (Four key sections only – not the entire Decree -- were deferred by use of a s.44 Order, to come into force on 1 January 2018 and were to be revised, since deferred to 30 June 2018).
- iv) Empowered the Minister of Labour to issue a Declaration or Notification saying what activities were not 'work'.

There may be different English versions of the important change in (ii) but it is an intentional change which is understood to remove from the requirement for a work permit those situations where, for example, people may be meeting to discuss the business or economic environment, or may be speaking at a conference where they are not carrying on an occupation or undertaking any business. This part of the 23 June 2017 Decree was not deferred and has the force of law.

It is not clear whether the interpretations announced in March 2015 (Appendix 1) are still relevant but the proposed Ministerial Declaration (Appendix 2) would make them obsolete.

The proposed Ministerial Declaration (with proposed legal text and other details) in English and Thai are in Appendix 2, which also addresses the following issues:

- Those doing unpaid, volunteer work. There are some safeguards to avoid abuse.
- Arbitration in Thailand needs promotion. It is proposed that an Arbitrator would not need a work permit (and that rules about work permits for foreigners acting as counsel in arbitration proceedings should be more accommodating). (JFCCT / EABC have a separate policy on Arbitration)

This declaration is supported by historical background. Thailand is already a party to the APEC 'Business Mobility' principles (see Appendix 4), but has not implemented these in domestic law and they should apply to all nationals (see below in Recommendation 3 about a business visa / visa free proposal).

There have been two recent and clear official statements about what can and cannot be done at meetings and conferences (both reported in the English language press in Thailand) under

current rules. These issues need to be addressed:

(i) The Dept. of Employment has reconfirmed that a foreign director of a Thai company may not sign accounts (financial statements) at a board meeting unless he has a work permit, and that defect vitiates (undoes the validity of) the accounts. The workarounds proposed are very cumbersome (and one may not even be valid) and add to 'doing business' overhead. This conflicts with what was understood to be the general intent of the March 2015 interpretation (see Appendix 1 ), and flies against the very purpose of IHQ policies which are to encourage regional and international headquarters to be established in Thailand -- in other words that people not usually working in Thailand can come here to carry out various business activities. This official statement by the Dept. of Employment directly limits their ability to do so (and presumably would also prevent them from chairing, or even presenting a report at a board meeting). In fact, these are normal business activities for a director of any Thai company, not only those with IHQ status.

(ii) The holder of a business visa was advised that he could not speak at a conference as this was 'working', again contrary to the general understanding of the March 2015 interpretation. According to press reports, the DoE officer said that the law would be applied to all, regardless of the nature of the work being done or subject matter of the Conference.

Thailand is a sought-after MICE destination with many conference organisers arranging high level conferences, often with high-level visiting speakers. These foreign speakers need a work permit to be in-line with the law, but it is not the practice of such organisers to advise them accordingly or help arrange such a work permit.

In all cases where a business visitor is in Thailand carrying out various 'business visitor' type activities for which a work permit is currently needed, there is a high likelihood that a claim under a travel insurance policy would be denied as the business traveller did not hold all valid permits to perform the activity. For IHQ activities, with frequent, but often short notice visits, there is a business risk due to non-compliance.

### **Recommendations to support Business Visitors**

1. Institutionalise, embed in departmental and agency procedures, and train government officials about the change to law due to the 23 June 2017 Decree which narrowed the definition of 'work'. Under the new Decree, 'work', starting as any physical or intellectual effort, also requires that the activity must be linked to activities conducted for the purpose of carrying on an occupation or undertaking a business.
2. Without narrowing the scope of action 1, it is requested that the Minister of Labour issue a Declaration about what is not 'work' – the recommended text is provided in Appendix 3 in English and Thai.
3. Redefine the relevant Business Visa so that it is available on a Visa on Arrival basis simply by stating the purpose of visit. If there are security concerns for a limited number of countries, an on-line facility such as used by Myanmar could be explored, *OR* allow 'no visa' business purpose entry for most countries. The validity might be for 30 days, extendable (e.g. once per entry).

4. There should be no need for the WP-10 category for ‘urgent and necessary work’; as no work permit would be required for any of the activities contemplated. While the 29 June 2017 Decree (see Appendix 5) provided some streamlining under current arrangements, our recommendation is to dispense with the separate category WP-10.
5. As should be the case for all processes, put everything on-line and eliminate paper-based assessment. Dispense with the use of TM.6 for tourists, Business Visitors, and others.

*This is the end of the Business Visitors Group part.*

## ADDRESSING GROUP 2: WORKING IN THAILAND

For people who are not Business Visitors (ie people who are living and working in Thailand), a number of changes are needed to the overall system

### (a) Distinguishing between unskilled and skilled labour – major review?

As with other middle income and higher income economies, reliance on cheap foreign labour has had the effect that many citizens do not want to perform certain tasks and, as a result, productivity and innovation in the economy are not necessarily being enhanced. Forcing less reliance on unskilled labour does not seem to be the answer, but nevertheless the characteristics of unskilled vs skilled are different. There is scope for a dual regime with different kinds of work passes. For example:

#### Dual regime recommended- illustration

<b>Skilled / Semi-Skilled (eg “Employment Pass”)</b>	<b>Unskilled (eg “Work Permit”)</b>
High pay minimums, qualifications (academic, vocational + experience)	Lower pay minimums, no qualifications
Health – self declare Up to 5 years	Health – self declare + screening, tests
Longer period (eg 4-5 years)	Shorter period.
No 90-day reporting report changes only	Revised 90-day reporting (eg on line with employer assistance)

**Recommendation (a):** Restructure permits and licensing into skilled / unskilled categories with different requirements.

### (b) Visas for Thailand 4.0

The Smart Visa in four categories has many attractive features (for example, a single instrument (‘work visa’), annual not 90 day reporting, four year duration, consideration of spouse’s position), but is limited in scope due to minimum salary and other requirements and

with the approximately 1,000 applicants stated to be expected, will not make much of a difference to overall national re-skilling goals. Appendix 7 shows the updated recommendations about a revised Smart Visa, following a consultation with BOI on 15 November 2017. Some of the points have been incorporated, with thanks, in the updated Smart Visa (see notes in Appendix 7), three in particular:

- Eligibility for the Smart Visa by those already working in Thailand, subject to meeting the criteria in each case;
- The Investment in the Investor category can be in more than one company;
- Minimum salary for senior executive reduced from 500,000 baht to 200,000 baht.

It is recommended to build on the Smart Visa advances and address these points below. In particular, using one instrument – a ‘work visa’ should be used in all relevant cases.

JFCCT / EABC has recommended these objectives (See document ‘Visas for Thailand 4.0 updated October 2017)

1. Attract, and encourage retention of skills in tech and tech-related areas. Such skills may involve people with hi-tech skills or it may also involve those with senior executive capabilities.
2. Allow flexibility (e.g. through either broadly-drawn policies, or via different sub categories) so that a range of interested participants are attracted:
  - a) Individuals with skills being hired into a tech enterprise or an enterprise where the tech skills are needed
  - b) Individuals with skills who have not yet found employment (thus a permit attaching to the individual needs to be included).
  - c) Individual entrepreneurs starting their own companies
  - d) Investors with capacity to invest
  - e) Senior executives
3. ‘Engagement’ or ‘hiring’ by a company needing the tech services should be allowed by employment or by a services agreement.
4. Visas should support training and educational activities, both in-house and possibly through an institution providing a course for a company. Thus, one job function which the visa should support would be to do training (which would support skills transfer).
5. Where relevant, the employer or company providing the services of an individual can be a foreign company with no presence in Thailand.
6. Recognise the family and allow spousal visas (e.g. Residence Permits in the French example, or Dependant’s Pass in the Singaporean example) allowing limited work without further action, and the presence of children. Currently for a Thai-foreign couple the foreign spouse on an ‘O’ visa can apply for a work permit. For a foreign-foreign couple a spousal visa is available if the primary applicant is on a B visa. For the ‘O’ visa holder to work in this situation, a ‘B’ visa needs to be applied for. The change requires a trip outside Thailand. A change to allow for easily obtaining a ‘B’ visa without a trip, or (better) allowing for a work permit on a ‘O’ visa would save much time and bother.

7. Wherever certain kinds of skills are prioritised, take care with skills classification. JFCCT has long recommended the use of a competency framework so that the same language or taxonomy is used by all relevant parties. A tech visa should be neutral or 'technology agnostic', supporting policy flexibility for targeting specific skills from time to time. On a separate, but related point, JFCCT has also recommended avoiding creation of new skills certifications in the IT area. The STC approach of recognition rather than certification is noted.
8. Avoid second-guessing which might arise from a mandated the use of STC to recognize talent. Where an employer has identified an individual and believes that the individual has the necessary skills, that should be sufficient. For example, some people in high-tech roles have no academic qualifications or easily recognizable certifications; however, they are skilled, valuable to their employer, and highly sought after. The relevant benefit of STC recognition (i.e. not having to comply with local:foreign staff ratios) may not be important in a relevant case. Thus, does the Smart Visa really need a Project Incubation Certificate?
9. Avoid limitations about which companies a visa holder can be associated with. Further review may be needed to add the necessary flexibility about this. The French example may be restrictive unless there is a fast means of recognizing the enterprise.
10. Avoid confusion and complexity introduced through unharmonized rules and policies about work permits and visas. For example, can certain visas be issued with an inherent work permit? To create a viable, long-term solution, the 'work-visa' concept warrants serious development.
11. Avoid micro-level rules and pre-conditions which thwart (undo) the main purpose.
12. Consider the benefits of reduced personal income tax for relevant staff in order to be competitive. (It is noted that the reduced personal income tax rate of 17% relates to the EEC and does not attach to Smart Visa).

**Recommendation (b):** Noting the listed objectives 1 – 12 in this part (b) and the specific recommendations in some of those objectives, it is recommended to build on the Smart Visa advances. In particular, using one instrument – a 'work visa' should be used in all relevant cases.

### **(c) Paper work and lead time; going on line**

Applying for a work permit requires, in most cases, first obtaining a non-immigrant "B" visa from a Thai Embassy or Consulate (i.e. outside Thailand). Additionally, the set of requested documents varies from consulate to consulate, making it difficult to prepare a completed application.

We suggest allowing the application for a non-immigrant "B" visa, if required, to be submitted from within Thailand (with standardized requirements), thereby streamlining the process for companies. Alternatively, the requirement for a "B" visa could be eliminated if a work permit is being sought, or [as noted above](#), no work permit should be needed if an appropriate category of visa is granted.

The huge volume of paperwork needs to be reduced and a different standard of proof used. A number of actual cases are referred to in our attachments, demonstrating these problems (see:

[www.jfct.org/major-business-issues/work-permit-visa/](http://www.jfct.org/major-business-issues/work-permit-visa/) see 'Actual Cases'). **We believe that many senior, government officials are unaware of the significant burdens imposed by the current documentary requirements.**

Aa 'whole-of-government', on-line architecture be devised as soon as possible, to allow introduction of efficiency improvements in high priority areas.

Unfortunately the Licence Facilitation Act does not include eGovernment or 'on line' targets, so some other means would be needed. This omission has meant that agency manuals based on paper processes have been created, but in going on-line, process re-engineering would be needed, thus new procedures. This is inevitable.

**Recommendation (c):** Eliminate unnecessary steps. A 'whole-of-government', on-line architecture be devised as soon as possible, to allow introduction of efficiency improvements in high priority areas. Take the opportunity to effect business process re-engineering.

#### **(d) Location of work**

A Work Permit should not be location-based; the nature of how business is generally conducted has changed since that requirement was originally introduced. Location should be removed as a component of the job description but a principal office can be noted. Currently the validity of a work permit is limited to a specific District and sub District (Tambon) of work, or even to a specific street address and floor of a building.

**Recommendation (d):** Remove location of work restrictions. If zonal-based benefits apply, they can appear in a different instrument, or as a qualification by exception.

#### **(e) 90-day reporting**

In our recommendation, only a change of residential address should need reporting, and time-based reporting should be abolished. A downloadable app as well as a good on-line system are needed. An on-line system was trialed but removed and, to our knowledge, has not been made live again. The collection of certain highly intrusive and sensitive personal data is unlikely, in our opinion, to make a difference to reduction of crime. There is a separate submission on this aspect.

The change to annual reporting for the Smart Visa is noted, eliminating 90 day reporting in that context.

A change of business address is currently required to be reported in the Ministry of Labour.

**Recommendation (e):** Eliminate 90 day reporting; change to report (on-line) residential address.

#### **(f) Ability to carry out legitimate business activities**

For the avoidance of doubt, a Work Permit holder should not need any additional permission or permit to carry out non 'work' related business activities outside the company for which he

holds a Work Permit. (Example – Work Permit holder works for company X but in addition, with the consent of employer, is a director of a social enterprise and signs financial statements in that capacity).

It seems difficult to identify a legal basis for the requirement to include a Work Permit for directors of chambers or trade associations not related to one's main job, but it is a practice of MOC to require it. Where a person is not 'working', under the proposed new definition of 'work', no work permit should be needed. There is already a partial change to the law, as noted, which should be implemented (see Recommendation 1 under the part above about Business Visitors).

**Recommendation (f):** Clarify that no additional work permit is needed for a work permit holder to carry out non work activity; and effect/implement this change in procedures.

### **(g) Staff ratios; Capital invested**

When applying for a work permit, there is a requirement from the Immigration Bureau that the company employ at least four Thai nationals for every one foreigner employed. This is despite the Employment Dept. having advised Immigration that it no longer enforces those ratios itself.

SME's providing or developing digital technology or other new products or services often start up with one or two people plus intellectual capital, not cash invested in plant and equipment or a large staff. These companies are therefore unable to hire foreign technical experts, even when there are no local resources available with the necessary skills.

We suggest eliminating the Thai-to-foreign staff ratio for issuing long-term visas to work permit holders.

Further, for many start-ups and SME's there is little capital invested. Requiring high invested capital prior to having the ability to hire foreigners does not enhance the ease of doing business, or help advance towards achieving Thailand 4.0 goals.

**Recommendation (g):** Cease using capital invested and staff ratios as bases for hiring foreigners. .

### **(h) Repeated submissions of the same documents; high volumes of paperwork required**

Visa renewals require repeat submission of the same documents supplied with the initial application, even when the information is unchanged. This duplication results in excessive paperwork (often hundreds of pages for each renewal, many requiring original authentication each time by other government agencies).

Exactly what needs to be submitted should be minimally defined and the standard of proof reduced.

It is recommended that unless there is a material change in the document, any document

referred to for an application in the past should not require re-submission.

This should be a change to an administrative process and possibly a change to regulation rather than a change to the law. It would also require a change to data retention. The scanning of hard copies or the submission of soft copies in a secure environment would be needed.

The impending entry into force of a planned Personal Data Protection law will likely require agencies to allow data subjects access to their own records; a change to on-line management of records will be needed. This is a good opportunity for a major change to record-keeping.

**Recommendation (h):** Review and revise procedures for document retention and record keeping. As with Recommendation (c), process re-engineering is needed in the context of a whole-of-government , digital government architecture.

#### **(i) s. 44 Order requiring officers to obtain copies**

There is an Order requiring the accepting officer to fetch his own copies of Thai documents (i.e. documents issued by Thai authorities; this would not cover documents produced overseas, such as a foreign marriage certificate). In practice, however, some applicants have found it to be too slow to wait for official, internal action to obtain documents from other government agencies, and so they continue to fetch their own.

**Recommendation (i):** If the s. 44 Order about sourcing documents is to be of use (as it should be), include it as part of the review and re-design described in Recommendation (h)..

#### **(j) The Mode 4 issue**

Where relevant, the employer or company providing the services of an individual can be a foreign company with no presence in Thailand. This situation has caused problems in the past, where for example, a globally-recognized company providing technical services needs to provide services by deploying a person into Thailand. This would be via Mode 4 – i.e. there is no local employer therefore the services cannot be provided cross-border by electronic means or by mail (Mode 1).

This matter is addressed in detail in Appendix 7 under“ General issue (b): Considering Mode 4 service delivery.”

**Recommendation (j):** Review, consult about and propose a mechanism for Mode 4 service delivery minimal, legal licensing which does not introduce tax complications. Alternatively exempt the requirement in order to foster advanced service sector development.

#### **(k) Those below 50 years old who wish to spend longer periods in Thailand**

One example from Norway – those that work in the North Sea in the oil industry have a typical schedule:

Work 3 weeks / Holiday 4 weeks

Work 4 weeks / Holiday 5 weeks

They have bought apartments in Thailand and would like to spend their holiday here, but due to the visa restrictions of a maximum stay of 90 days within a 6 month period, many now find themselves facing problems when entering Thailand.

This group contributes a lot of revenue to the Thailand economy.

**Recommendation (k):** Revise requirements to accommodate groups such as holidaying visiting foreign skilled workers as this easily.

### **(l) Use of E-Gates**

It makes economic sense for as many groups as possible to be able to do perform auto clearance. This should include:

- Citizens
- PR Holders
- Any category of visa holders where information is held on file; linked to a passport.

This is the current practice of several others countries in Asia, most countries in Europe and the US has just begun implementation as well; in effect, it reduces costs and queues. There is usually a one-off registration step (renewable at expiry of the particular visa held; in the case of PR there might be an associated five-year instrument.

It is believed that PR holders (permanent residents) can register for the ability to do this; however there are administrative challenges which can render it difficult. See actual case of this at <http://www.jfcct.org/major-business-issues/work-permit-visa/> 'Actual Cases'. It is recommended to effect a one-time, fast and simple registration process.

**Recommendation (l):** Devise a procedures for easy registration for eGate usage for visa holders where information is held on file; linked to a passport, not just for citizens and permanent residents.

### **(m) Harmonised Validity between Work Permits and Visas; Operational Harmonisation**

It is recommended to merge work permit and visa in many situations to a 'work visa'. Before that, wherever possible, unless there is a compelling reason for exceptional treatment, a Visa and Work Permit (where one is necessary) should expire at the same date and be of the same period. Currently there are situations of two-year Work Permits but one-year Visas.

#### **Operational**

There appears to be little coordination between the Immigration Bureau and the Employment Department (Ministry of Labour) for the visa and work permit application process or for

subsequent renewals (with an exception for BOI-promoted companies). This may possibly be due to the effects of current regulation. Each organization requires its own copy of the same documents to be submitted. The lack of coordination between Labour and Immigration results in many difficulties and inconsistencies including the following:

- No automatic coordination of visa term with validity of work permit (e.g. a maximum two-year work permit but maximum one-year visa). Synchronize the validity of the visa with that of the work permit.
- 90-day reporting (this issue is addressed elsewhere)
- Upon termination of a work permit, the employee has only seven days before expiry of the visa. This leaves no time for terminating a lease, closing bank accounts, managing personal effects, or transitioning to new employment. Extending the period of time visas remain valid after termination of a work permit. A 90-day visa extension following work permit expiration would allow a realistic period for personal and professional reorganization.

It is common practice in many countries to have a single point of contact at borders. Thus, the Bureau of Immigration could take on the role of being the point of contact for many Work Permit issues (where necessary) with the objective as far as possible to combine into a single instrument.

**Recommendation (m):** Harmonise work permit and visa terms; in the longer term, use one instrument (eg work visa).

## (n) Chamber permits

One key role of chamber staff is to help promote trade and investment into and with Thailand. Currently, the Executive Directors of foreign chambers of commerce can obtain their work permit at the BOI Chamchuri Square office (one year only, this used to be two years). Other staff can get one year work permits but they need to apply for a three-month “O” visa every three months because chambers of commerce are classified as NGO’s. While this may be technically correct, a new classification as “BOI partners” or “foreign investment partners” could make the situation much easier with two-year work permits and two-year non-immigrant “B” visas issued for all chamber staff.

**Recommendation (n):** All two year work permits for all chamber of commerce staff.

## (o) Residency Status

We recommend that Permanent Residency Status include an inherent general Work Permit or an exemption from the requirement for a work permit. The requirement for Permanent Residents to obtain re-entry permits is also questionable.

**Recommendation (o):** Exempt Permanent Residents from the need for a work permit, or deem a flexible work permit to be included.

## (p) Wholesale change to rules about Professions not open to foreigners

A 1979 Decree describes some 39 professions not open to foreigners. In addition, profession-specific regulation further restricts the ability to carry out certain activities.

JFCCT / EABC have identified some 7 or 8 of these 39 which are most relevant to enhancing the economy which are separately analysed. See Appendix 7.

These rules have the effect of undermining the spirit and intent of the eight or so Mutual Recognition Arrangements (MRAs) amongst ASEAN Member States and goals such as a Single Aviation Market (SAM).

While in some cases basic quality needs to be assured, in many cases the restrictions seem to be no more than profession-level protectionism.

They can also have the effect of undermining service sector liberalisation which is not just about lifting foreign equity limits but also (amongst other things) about allowing in the right skills to support carrying out the mission of the venture.

**Recommendation (p):** Participate and consult with the foreign business community and local business community about overdue changes to removing many items from the list of 39 professions, with a view to achieving the skill sets needed for a skilled workforce, that Thailand 4.0 vision and an intelligent society.

## (q) Special issues about unskilled and semi-skilled workers

Certain restrictions and practices contribute to needless effort and paperwork. A Pink Card in an unskilled work setting had been used in practice as a proxy for a foreigner ID (eg passport) when the foreign ID may not have been available. The rules changed to require relevant foreign employees both the National ID and a pink card; if there was no foreign ID, one must be applied for.

It is recognised that combatting human trafficking and meeting minimum standards for working conditions are important aspects of a forward-looking economy and society. Introducing greater transparency and visibility through the implementation of an efficient system for the hiring of unskilled foreign workers would be welcomed by Thai and foreign companies alike.

The following **recommendations (q)** relevant to unskilled labour are made:

1. Expanding use of the “pink card” to facilitate employers’ ability to increase workforce for short-term periods without entering quota or agency systems. This will support the freer movement of labor (an AEC goal).
2. Reducing to a nominal amount the visa fee, re-entry permit fee, and pink card issuing fee, for unskilled foreign workers.
3. As with our general recommendations, allow for work nationwide without further geographical registration or additional medical checkups. This would make it easier for companies in the service sector to allocate resources more efficiently. An example would

be a company registered in Bangkok which needs to provide service in an upcountry province for a period of time on a temporary basis. When the company deploys foreign workers to work at a client site, those workers might need to stay in a motel, labor camp or similar temporary accommodation which is not the employer's premises. Under current law, the employer should apply to modify/extend the work location defined in that employee's work permit. Even if a company is to provide labour under a service contract for, say, 7-10 days in a particular province, the employer is supposed to re-register the worker in that particular province, possibly including the repetition of a medical checkup.

4. Also as with the general recommendations, abolish mandatory 90-day reporting, and report changes only. Reporting changes of residence could in many cases be done by the employer on a group basis. Reporting change of principal work location is already an existing requirement.

5. As a separate but related issue, consideration might be given to the specific economic and societal bases for maintaining restrictions on the number of unskilled workers using a quota system. In many cases it is hard to see the justification assuming the demand for the labour exists. This should apply to workers already carrying a foreign ID (Passport or equivalent).

*This is the end of the 'Working in Thailand Group' (ie non Business Visitors Group) part.*

### **List of Appendices**

- 1) March 2015 DoE interpretive changes
- 2) Text of proposed Minister's Declaration (in EN and TH)
- 3) 23 June 2017 Decree – penalties
- 4) Basis of APEC 'Business Mobility'
- 5) 29 June 2017 Urgent Duty process changes
- 6) About Smart Visa
- 7) 39 Professions not open to foreigners
- 8) Types of Law

## Appendix 1 - The March 2015 Dept. of Employment / Council of State interpretive changes

Expanded interpretation March 2015	But what about ?
i. Attendance at meetings, gatherings of information or seminars.	Giving a paper or presentation, chairing a session?
ii. Attendance at exhibitions or trade exhibitions	Exhibiting, selling an item?
iii. Visit at business operations or attendance at business meetings	Presenting a paper or report, chairing, signing financial statements?
iv. Participation to listen to special lectures and academic lectures	Chairing a session, giving part of a lecture; being on panel? Speaking at length from the floor?
v. Participation to listen to lectures in any technical trainings and seminars	Chairing a session, giving part of a lecture?
vi. Purchasing of goods at trade exhibitions	Selling goods?
vii. Attendance at the alien company's board meeting	Chairing, presenting a paper or report, signing financial statements? Does having IHQ/ROH/ITC status make a difference? If so, how?

This is a valid effort to interpret, but they are still restricted by the law. Instead of relying on these definitions which have had re-interpretations, changing the law is the only means. The proposed Ministerial Notification would overcome this..

As noted, there are already two specific rulings or statements which restrict the general statements in (i) and (vii). It is understood that there are also some additional activities in those categories which would still be considered as 'work'.

## Appendix 2 – Text of proposed Ministerial Declaration – what is not 'work'

**Text of recommended Ministerial Declaration pursuant to Decree of 23 June 2017 v 1.4**  
(late Oct 2017)

### ENGLISH VERSION

Without expanding on the definition of 'work' in the Decree being that the activity must be relevant to activities conducted for the purpose of carrying on an occupation or undertaking a business, activities not considered to be 'work' are:

- a) Conducting, arranging, organising or attending conferences, seminars, lectures or workshops and participating in any capacity including, but not limited to, presenting papers, chairing sessions etc;

- b) negotiating, proposing or setting up the sale of services or goods where such negotiations do not involve direct sales to the general public (although that may be part of the later intended business enterprise), but may involve sales or provision of samples
- c) Activities to set up businesses of any kind and related activities such as raising funds for investment, performing due diligence, or arranging representation, marketing or distribution agreements
- d) Attending board, management, shareholder or other general meetings and participating in any capacity, including but not limited to; chairing, presenting papers, management reports, or other reports, signing checks, signing financial statements or other corporate documentation, voting on resolutions, or any other activity which any board member or shareholder (or other member of the organisation) might be expected to carry out during the meeting or in that person's capacity as a director or board member (howsoever termed) or participant in the meeting.
- e) Carrying out investor-state Arbitrations or commercial arbitrations as an Arbitrator where the arbitral action has been originated, or member of the Arbitrator's office.
- f) Doing any other act, matter or thing incidental or related to any of these things.

The relevant activity would not be 'work', whether it is done by a foreigner visiting Thailand for the purpose of the activity, or by a person already in Thailand, holding a work permit for designated, employed activity with a different company, or already in Thailand for other, non-work related reasons, and who is to engage in the same kind of 'non work' activity as a foreigner seeking temporary entry, for which no work permit is to be required.

### **Volunteers**

For the avoidance of doubt, the following shall not be considered as 'work':

- (i) uncompensated volunteer activity for community or emergency assistance;
- (ii) uncompensated, volunteer activity for a charity or industry non-profit industry organisations
- (iii) occasional and non-regular, uncompensated, voluntary activity to support a small business or other similar organisation.

Compensation in this context shall include monetary or in-kind compensation, whether provided in Thailand or outside Thailand.

*(Following is a description rather than legal text)*

Existing exemptions for diplomatic and government work should continue.

The definition of 'work' would apply to all instances whether in the current context of a WP-1 permit or WP-10 permit (urgent and necessary work for less than 15 days) or other relevant context.

Separately, abolition of the WP-10.

## THAI VERSION

ข้อความที่แนะนำให้บรรจุไว้ในประกาศกระทรวงฯ ในส่วนที่เกี่ยวกับพระราชกำหนดฯ  
ณ วันที่ 2560 มิถุนายน 23 ตามข้อเสนอครั้งที่ ) 1.4 ปลายเดือนตุลาคม (2560

โดยที่มีได้ขยายคำจำกัดความของคำว่า "การทำงาน" ให้เป็นกิจกรรมที่เกี่ยวข้องกับการดำเนินการตามวัตถุประสงค์ในการประกอบอาชีพ คือ "การทำงาน" หรือการดำเนินธุรกิจ กิจกรรมที่มีได้พิจารณาให้เป็น

- ก) การดำเนินการ การจัดให้มี การบริหารจัดการ หรือการเข้าร่วมการประชุม การสัมมนา การบรรยาย หรือการประชุมเชิงปฏิบัติการ และการเข้าร่วมในบทบาทหน้าที่ใด ๆ แต่มีได้จำกัดเฉพาะกับการนำเสนอรายงาน การเป็นประธานการประชุม และอื่น ๆ
- ข) การเจรจา การนำเสนอ หรือการกำหนดการจำหน่ายการบริการหรือสินค้า ตามที่มีการเจรจาดังกล่าวไม่เกี่ยวข้องโดยตรงกับการขายตรงให้กับประชาชนโดยทั่วไป (แม้ว่าจะเป็นส่วนของผู้ประกอบการธุรกิจที่เกี่ยวข้องต่อไป) แต่อาจจะเกี่ยวข้องกับการขายหรือการนำเสนอตัวอย่าง
- ค) กิจกรรมเพื่อกำหนดธุรกิจ หรือกิจกรรมที่เกี่ยวข้องและในลักษณะใด ๆ อาทิ การระดมงบประมาณสำหรับการลงทุน การจัดทำมาตรการตรวจทานการดำเนินการ หรือการจัดหาผู้แทน การทำข้อตกลงด้านการตลาด หรือการจัดจำหน่าย
- ง) การเข้าร่วมการประชุมของคณะกรรมการบริหาร หรือคณะผู้บริหารจัดการ หรือผู้ถือหุ้น หรือการประชุมอื่น ๆ ทั่วไป และการเข้าร่วมในบทบาทหน้าที่ใด ๆ แต่มีได้จำกัดเฉพาะกับการทำหน้าที่ประธาน การนำเสนอรายงานเนื้อหา รายงานการบริหารจัดการ หรือรายงานอื่น ๆ การลงนามในเช็คสั่งจ่ายเงิน การลงนามในบันทึกทางการเงิน หรือเอกสารอื่นใดของบริษัท การลงคะแนนในมติ หรือการทำกิจกรรมอื่นใด ซึ่งบรรดากรรมการ หรือผู้ถือหุ้น หรือสมาชิก (อาจจะถูกคาดหวังให้เป็นผู้ดำเนินการระหว่างการประชุม หรือในบทบาทหน้าที่ของบุคคล ซึ่งเป็นผู้อำนวยการ หรือกรรมการ หรือผู้เข้าร่วมในการประชุม (ไม่ว่าจะเรียกว่าอย่างไรก็ตาม)
- จ) การดำเนินกระบวนการอนุญาตอุตสาหกรรมระหว่างรัฐผู้ลงทุน - หรือกระบวนการอนุญาตอุตสาหกรรมสำหรับภาคธุรกิจ ในฐานะกรรมการชี้ขาดหรือตุลาการ ในกรณีที่มีการดำเนินการด้านอนุญาตอุตสาหกรรมเกิดขึ้น หรือเข้าร่วมเป็นสมาชิกของสำนักงานของกรรมการชี้ขาดหรือตุลาการ

ฉ) การปฏิบัติอื่นใดในส่วนที่เป็นหน้าที่ เนื้อหา หรือสิ่งที่เกิดขึ้น หรือเกี่ยวข้องกับบรรดาส่งต่าง ๆ เหล่านี้

กิจกรรมที่เกี่ยวข้องจะไม่ถือว่าเป็น "การทำงาน" หากเป็นการดำเนินการโดยชาวต่างชาติที่เดินทางมายังประเทศไทยตามวัตถุประสงค์ของกิจการในประเทศไทยแล้ว วรรค หรือโดยบุคคลใด ๆ ที่ได้พำนักอยู่ในประเทศไทยและได้รับใบอนุญาตทำงานตามกิจกรรมที่กำหนดและว่าจ้างกับบริษัทอื่น ๆ หรือได้พำนักอยู่ในประเทศไทยแล้ว สำหรับเหตุผลที่เกี่ยวข้องกับสิ่งที่มีใช้งาน และผู้ที่เกี่ยวข้องกับกิจกรรมที่ ในลักษณะเดียวกัน "มิใช่การทำงาน" มาภายในประเทศเป็นการชั่วคราว ตามที่ชาวต่างชาติใช้ในการเดินทางเข้า ซึ่งมีจำเป็นต้องใช้ใบอนุญาตทำงานแต่อย่างใด

### อาสามัคร

เพื่อหลีกเลี่ยงข้อกังขา ลักษณะต่าง ๆ ดังต่อไปนี้ไม่ควรพิจารณาเป็น "การทำงาน"

- (1) กิจกรรมเชิงอาสามัคร ซึ่งมีได้มีค่าตอบแทนใด ๆ สำหรับชุมชนหรือการช่วยเหลือฉุกเฉิน
- (2) กิจกรรมเชิงอาสามัคร ซึ่งมีได้มีค่าตอบแทนใด ๆ สำหรับสาธารณกุศลหรือองค์กรอุตสาหกรรมที่ไม่แสวงหาผลกำไร
- (3) กิจกรรมเชิงอาสามัครซึ่งมิได้มีค่าตอบแทนใด ๆ ไม่ว่าจะดำเนินการเป็นประจำ หรือเป็นครั้งคราว เพื่อสนับสนุนธุรกิจขนาดเล็ก หรือองค์กรอื่น ๆ ที่มีลักษณะคล้ายคลึงกัน

ค่าตอบแทนในบริบทนี้หมายถึงรวมถึงค่าตอบแทนในรูปแบบเงิน หรือการสนับสนุนอื่น ๆ ไม่ว่าจะได้รับในประเทศไทย หรือนอกประเทศไทยก็ตาม

(ในส่วนนี้ เป็นคำขยาย หรืออธิบาย มากกว่าเนื้อความทางกฎหมาย)

คำจำกัดความของคำว่า จะใช้กับบรรดาเหตุการณ์ทั้งหมด "การทำงาน"

ไม่ว่าจะเป็นบริบทปัจจุบันของใบอนุญาตทำงาน WP-1 หรือใบอนุญาตทำงาน WP-10 (การทำงานที่มีความจำเป็นเร่งด่วน สำหรับระยะเวลาน้อยกว่า หรือบริบทอื่น ๆ (วัน 15 ที่เกี่ยวข้อง

ในกรณีที่แยก ให้ยกเลิก WP-10

**Appendix 3 – Penalties in 23 June 2017 Decree – but deferred\* for then-planned entry 1 January 2018 revised to 30 June 2018 due at least in part to backlog in registering migrant workers. At early March 2018, changes\*\* being made based on cabinet resolution.**

Note: \* only four specific provisions of the 23 June Decree were deferred, using a s. 44 Order

Note: \*\* proposed changes include removing jail term and reducing fine for foreign worker; reducing fine for employer.

<b>Offence</b>	<b>Penalty</b>
<b>Employer Offenses</b>	
Engaging a foreigner to perform work that is prohibited to foreigners	Fine between 400,000 – 800,000 Baht per foreigner in violation of these prohibitions
Engaging a foreigner who does not have a valid work permit (this would include the common problem where a foreigner has a work permit allowing her or him to work for one employer, but ends up working for another employer)	
Confiscating the work permit booklet or other important identification of the foreigner	Imprisonment of up to 6 months or fine of up to 100,000 Baht, or both
Engaging a foreigner to perform work that is not specified in the work permit	Fine of up to 400,000 Baht per foreigner
Failing to inform the authorities within seven days from the date that a foreigner has ceased working	Fine of up to 100,000 Baht
<b>Employee Offenses</b>	
Working without a work permit or performing work that is prohibited to foreigners	Imprisonment of up to 5 years or fine between 2,000 – 100,000 Baht, or both
Failing to notify the authorities before performing work which is categorized as “necessary and urgent” work. This will likely occur where an employee should have obtained an “urgent work permit” before performing work – see <a href="#">here</a> .	Fine between 20,000 – 100,000 Baht
Performing work other than work permitted and specified in the work permit	Fine of up to 100,000 Baht

## Appendix 4 – Bogor Declaration and the basis of APEC ‘Business Mobility’

[http://www.apec.org/Meeting-Papers/Leaders-Declarations/1994/1994\\_aelm.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/1994/1994_aelm.aspx)

### 1994 APEC Leaders’ Declaration (Bogor)

#### History

[The APEC Leader's 1994 Bogor Declaration](#) [*defective link – see below*] set the goal for free trade and investment in the Asia-Pacific region by the year 2010 for developed economies and 2020 for developing economies. [The Osaka Action Agenda \(OAA\)](#) [*defective link – see below*] of November 1995 is the blueprint for the achievement of the Bogor goals. One of the areas identified for action is to enhance the mobility of business people engaged in the conduct of trade and investment in the region. The OAA commits APEC economies to enhance business mobility by exchanging information on regulatory regimes, streamlining the processing of short-term business visitor visas and procedures for temporary residence of business people, using technology to improve border security and other counter terrorism measures and maintaining a dialogue on these issues with the business community.

In response to the OAA guidelines the BMG was formed in 1997 when the [APEC Business Advisory Council \(ABAC\)](#) [*see below*] made the facilitation of business travel a priority. The ABAC provides recommendations to the APEC Committee for Trade and Investment's (CTI) agenda on Business Mobility, and the BMG keeps ABAC apprised of its progress. Business is closely consulted in the development of the APEC Business Travel Card scheme and other BMG initiatives.

#### Bogor Declaration and Osaka Action Agenda

[http://www.apec.org/Meeting-Papers/Leaders-Declarations/1994/1994\\_aelm.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/1994/1994_aelm.aspx)

#### 1994 APEC Leaders’ Declaration (Bogor) - extracts

1. We, the economic leaders of APEC, came together at Bogor, Indonesia today to chart the future course of our economic cooperation which will enhance the prospects of an accelerated, balanced and equitable economic growth not only in the Asia-Pacific region, but throughout the world as well.

....

7. To complement and support this substantial process of liberalization, we decide to expand and accelerate APEC'S trade and investment facilitation programs. This will promote further the flow of goods, services, and capital among APEC economies by eliminating administrative and other impediments to trade and investment.

From this developed over some time the Business Mobility principles and agreed rules

**Osaka Action Agenda** implemented the Bogor goals.

[http://www.apec.org/~//media/Files/Groups/IP/02\\_esc\\_oaupdate.pdf](http://www.apec.org/~//media/Files/Groups/IP/02_esc_oaupdate.pdf)



02\_esc\_oaupdate.  
pdf

*Section 13 – p. 20 – key points:*

### 13. MOBILITY OF BUSINESS PEOPLE

#### OBJECTIVE

APEC economies will:

- a. enhance the mobility of business people who are engaged in the conduct of trade and investment activities in the Asia Pacific region; and
- b. enhance the use of information and communications technology (ICT) to facilitate the movement of people across borders, taking into account the Leaders' Statement on Counter Terrorism.

#### GUIDELINES

Each APEC economy work toward achieving the above objectives:

- a. abiding by directions and statements from APEC Leaders and Ministers;
- b. recognising APEC Principles on Trade Facilitation; and
- c. consistent with the Informal Experts Group on Business Mobility's (IEGBM) capacity building standards and annually agreed goals.

#### COLLECTIVE ACTIONS

APEC economies will:

##### Exchange Information

Exchange information on regulatory regimes in regard to the mobility of business people in the region, including through regularly updating the information in the online APEC Business Travel Handbook

##### Short-Term Business Entry

Streamline short-term entry requirements for business people. APEC economies will strive on a best endeavours basis and according to their own immigration procedures to implement one or more of the following options:

- i) visa free or visa waiver arrangements;
- ii) participating in the APEC Business Travel Card scheme;
- iii) multiple short-term entry and stay visas which are valid for at least 3 years.

##### Business Temporary Residency

Implement streamlined temporary residence processing arrangements for the intra-company transfer of senior managers and executives, and specialists as defined by individual economies.

##### Capacity Building (Technical Cooperation and Training)

Develop and implement the mutually agreed standards and benchmarks essential to capacity building and engage in the capacity building initiatives necessary to provide streamlined visa application and immigration entry, stay and departure processing arrangements.

##### Dialogue with Business

Continue to maintain a dialogue with the APEC Business Mobility Group and the APEC business community (including with APEC fora) on mobility issues important to the APEC region and the APEC business community.

#### **Comment:**

Thailand is a signatory to the relevant APEC instruments. Thailand did implement visa regulations in support of the business mobility principles and rules, but did not, it appears, fully implement the work permit changes necessary to support these.

## Appendix 5 – 29 June 2017 Notification from Dept of Employment about speeding up WP-10. (Description from Baker & McKenzie).

<https://www.bakermckenzie.com/en/insight/publications/2017/07/new-urgent-duty-work-permits>

### New Urgent Duty Work Permits' Rules and Criteria Under a New Legal Regime (Baker & McKenzie client alert)

It has long been legally established that in order for non-Thai nationals to work in Thailand, they must obtain work permits first before commencing the work. This requirement has always been recognized and specified within all of the previous legislations including the old Alien's Work Act B.E. 2521 (1978) and the most recent legislation i.e. the Alien's Work Act B.E. 2551 (2008) ("**Old Act**"), which has just been revoked by a new Emergency Decree on Managing the Work of Aliens B.E. 2560 (2017) ("**Decree**").

If the work to be done by the foreigners is considered necessary and urgent, and the duration of the work is within 15 days, the foreigners can notify the work permit officials and obtain urgent duty work permits instead of normal work permits. Under the Old Act, the urgent duty work permits were granted based on urgency, necessity and suitability, and therefore, the foreigners or the Thai companies had to provide justifications for applying for these work permits to the work permit official when notifying them e.g. details of the works to be done in Thailand, duration, why the works are considered as necessary and urgent that the foreigners must carry them out. Even though it is only a notification process where foreigners/companies simply notify the work permit officials by submitting a notification form for an urgent duty work permit without needing their approval, in practice, most foreigners/companies still wait for the officials to review the said form and its details to consider, among others, whether the justifications were acceptable and whether the foreigners are eligible for an urgent duty work permit. If the officials agree that the foreigners are eligible for an urgent duty work permit, they will then affix an acknowledge of receipt stamp into the submitted form. In that case, the foreigners/companies would use that affixed form as evidence of an urgent duty work permit. Thus, in a way, the work permit officials still have certain discretion as to whether the justifications were acceptable and whether the urgent duty work permit should be granted to the applicants or not.

On 29 June 2017, the Department of Employment has issued a Notification Re: Prescribing Types of Works which are Necessary and Urgent (the "**Notification**") under a new Decree. Under the Notification, if a foreigner will be engaging in any of the following works in Thailand where such work will be completed within 15 days, it will automatically be considered as a necessary and urgent work - for which an urgent duty work permit would be granted.

1. organizing meetings, trainings or seminars work;
2. special academic lectures work;
3. aviation management work;
4. internal audits work from time to time;
5. follow-up and solving of technical problems work;
6. product or goods quality inspection work;
7. manufacturing process inspection or improvement work;
8. machinery and electric generator equipment system inspection or repair work;
9. machinery repair or installation work;
10. electricity vehicle system technician work;
11. aircraft or aircraft equipment technician work;
12. machinery repair or machinery controller system consultancy work;
13. machinery demonstration and testing work;

14. filming motion pictures and still photography work;
15. selecting recruitment persons for sending workers to work overseas; and
16. testing skills of technicians for sending them to work overseas.

As a result of this Notification, from now on, when applying for an urgent duty work permit, it is no longer necessary to justify to the work permit official how the work is urgent and necessary, but instead, the applicant must justify that

(1) the work that they are requesting for an urgent duty work permit is one of the 16 types of works specified within the Notification, and

(2) that the work can be completed within 15 days.

This should at least reduce the work permit official's discretion in connection with this urgent duty work permit which should better facilitate the application of urgent duty work permit for foreigners coming to work in Thailand for a short period. However, it still remains unclear as to how effective this Notification would be. Moreover, it is still possible the work permit official will ultimately have some discretions in deciding whether the present case qualifies for the urgent duty work permit e.g. whether the work falls under the 16 types under the Notification, and whether the work can actually be completed within 15 days which requires justification from the applicants. It is important to know that foreigners who engage in these necessary and urgent works without having obtained the urgent duty work permits shall be liable to a fine from Baht 20,000 - 100,000, which is temporarily suspended until 1 January 2018 pursuant to the Order Number 33/2560 of the National Council for Peace and Order.

**Comments:**

- (i) This is an effort to streamline; but the recommendation in this document is to remove a number of activities from the definition of 'work' and use the same definition of 'work' for normal duty and urgent duty.
- (ii) This 29 June 2017 Notification does not remove the need to obtain a WP-10; it simply streamlines the process.

## Appendix 6 – About Smart Visa

**Follow up from 15 Nov: Combined summary of AmCham / JFCCT comments on BOI proposed regulations for SMART Visa Program (v 15 Nov) v. 1.8A**

AmCham and JFCCT are grateful to the Secretary-General for the discussion and consultation on 15 November. This document focuses on a few topics by way of follow up. It does not replace the 15 November Combined Summary of comments but focuses on certain points.

*[Three changes which were made to the terms of the Smart Visa are noted at the relevant points]*

### A. Background

There are four categories or sub classes in the Smart Visa:

- Talent – or skilled people with technical skills
- Investor
- Executive – like a senior executive, people who can make a difference.
- Start Ups

The change to eliminating the need for a separate work permit, and the change from 90 day to one year reporting are very much welcome. Additional benefits such as the right of the spouse to work, or reduced personal income tax may attach to promotions relevant to the EEC, but a Smart Visa should not prevent those additional benefits assuming they are otherwise relevant (eg being in the EEC). If those additional benefits are important, the candidate should not be forced to choose between Smart Visa on the one hand and being in the EEC on the other.

The objective should not just be to make it a bit better for those who could easily obtain a Non Immigrant B visa and Work Permit, but to attract people in all categories.

We also recommend that the objective should be to attract and retain talent.

### B. General issues and questions

#### **General issue (a): Foreigners already in Thailand.**

We would recommend that the Smart Visa should be available to appropriately qualified candidates already in Thailand and not just those who are not yet in the Kingdom.

*Reasons:*

(i) There are many foreigners currently working in Thailand under sub-optimal work permit and visa arrangements who would respond positively to the Smart Visa incentives.

(ii) It would be an artificial distinction to say that only those not yet in Thailand are the people who will make a difference in these four visa categories.

(iii) A foreigner with Thai experience will know society, business and culture better and will thus have a better chance of success (all other things equal) than someone without such experience and knowledge.

(iv) It is a long-standing, empirically derived marketing maxim that it costs in the order of three to nine times as much to get a new customer as it does to enhance and support an existing one.

(v) Typical case: A bright, young, foreign tech professional who has finished a work assignment here in Thailand and has met two or three Thai tech professionals, decides to join them in starting up a company to produce innovative software apps. Why make him or her leave Thailand, just to turn around and come back (cost factor, time wasted, etc.)?

If people have the necessary qualifications, why make them go back overseas if only to return here? That would add unnecessary burdens of cost, time, etc.

It is clarified (thank you) that a Smart Visa does not require being located in the EEC. There may be other promotions and benefits of being in the EEC and as we understand it, the right of a spouse to work is not prevented by the Smart Visa, assuming that right would apply based on another program.

*[Comment: a change to the programme was announced by BOI on 31 January 2018 to the effect that existing holders of Business Visas would be eligible, subject to the terms of each category, for a Smart Visa; presumably the same applies to Permanent Residents. The change was welcomed]*

#### **General issue (b): Considering Mode 4 service delivery**

This question is relevant to Smart Visa and cases where without a Smart Visa there is no ability to get a work permit. Can the third-party employer be a foreign firm, not located in Thailand and without any local corporate presence?

Consider the case of a foreign consulting company or professional services company hired by a multinational to implement and certify that certain high-tech manufacturing or global quality control standards are being met by the company's manufacturing facility in Thailand, and to teach local staff how to maintain them. If the consultant's presence in Thailand were required for 6 months, say, could he or she apply for a SMART Visa? (or if not a Smart Visa, a Work Permit and non-Immigrant B visa?)

Would the overseas consulting company (which may have no presence in Thailand) be applying for the SMART Visa on behalf of the individual (or for the traditional non Immigrant B visa and work permit)? Or would it be the local, Thai company which is using the consultant's services (even though the local company is not paying the consultant's salary; they are paying the consultant's employer – an overseas company – for his or her services here)? The latter has a problem with conflicts as shown in the specific example illustrated below.

The goal of bringing a skilled person to Thailand to support the 10 S-curve industries, train local staff, etc. remains the same.

A **specific example** is a Scandinavian company manufacturing complex high-end products at specification in Thailand for export. The manufacturer's ultimate customer requires a quality certificate (Quality Certificate or QC) which in the particular case can only be provided by a limited number of approved quality certifying companies. In this case a foreign company, which needs to be arms' length from the manufacturer, must provide the certificate. The work is necessarily done by an employee of that foreign QC company (which has no corporate presence in Thailand).

It is not ideal that the only legal solution found was for the manufacturer to employ the foreign professional from the QC company. This resulted in a lengthy and expensive contract to minimize the obvious potential conflict and possible consequences due to such conflict.

We have heard of (but cannot confirm) a general practice that an accounting or law firm would provide an employment service in similar cases. In the specific example, such possible methods were not used.

Thus there needs to be a way to provide for this situation either via Smart Visa or existing methods involving a Work Permit.

Note: The above description about Mode 4 focuses on the Smart Visa (and ordinary Non Immigrant B visa + WP issues) and does not consider tax issues, which may involve permanent establishment and DTA aspects.

**General Issue (c):** As noted, eliminating the need for a separate work permit, and the change from 90 day to one year reporting are very much welcome.

We understand that for the Smart Visa, families are treated the same way as for BOI-promoted expats, which does not itself give a right to work.

Additional benefits such as the right of the spouse to work, or reduced personal income tax may attach to promotions relevant to the EEC, but a Smart Visa should not prevent those additional benefits assuming they are otherwise relevant (eg being in the EEC).

In all cases where those additional benefits are important, the candidate should not be forced to choose between Smart Visa on the one hand and being in the EEC on the other.

We assume that unless the rule about volunteer work changes, it would still be considered work, but volunteer work would not be excluded from a spouse's activity (assuming the spouse has the right to work).

The timeframe for reporting of changes in status should allow at least 30 days, not 15. If a contract has finished, for example, the person needs time to wrap up personal life and move OR (if permissible) seek other employment in Thailand (e.g. in the "Talent" category). As their skills have already been identified and approved as being strategic and important to support Thailand's economy, why not give them the chance to continue doing that?

**General issue (d):**

The Smart Visa program would not likely materially enhance VC or funding activity in Thailand. For Investor and Start-Up categories, it seems to be assumed that funding for new ventures is, to a large degree, already in place. There may be some indirect impact if additional start up or new venture

activity is generated by the Smart Visa program.

### **C. Issues and questions about the specific categories**

#### **SMART Visa – Talent**

We understand that ‘S’ curve industries are broadly defined (and the Ministry of Science and Technology would confirm). Specific expertise supporting those activities would be recognized rather than re-certified. As previously noted, we would recommend use of a competency framework for common understanding. For IT areas, the ITSS programme is attractive and we will separately provide more information about it.

We feel that the proposed minimum salary of 200,000 baht (reduced from 300,000) is still too high to include many technical IT experts. Best and brightest are often young talent for whom the market rate would likely be in the range of 100,000 – 150,000 baht per month, and a minimum in the range of 80,000 -100,000 baht would realistically also include the salaries an SME might pay for a technical expert. We understand that the level is intentionally high so as not to replace existing means of gaining a work permit and visa, but we advise that setting such a high minimum salary is most likely to defeat the entire purpose of this category (encouraging skilled foreigners to come work in Thailand) and will most likely result in very few applications.

For the avoidance of doubt, it should also be made clear whether the minimum refers to salary only or if it also includes the value of any guaranteed benefits in the salary package, such as housing, school, transport, guaranteed bonus.

#### **SMART Visa – Investor**

The minimum investment requirement of 20 million Baht seems excessive. In the six years of early-stage funding transactions publically recorded in Thailand there has never been an instance of a single angel investor putting that large a sum into a single entrepreneurial venture. Investors with such significant amounts of risk capital to commit to early-stage ventures are very much inclined to invest via an angel investment group or club. Thus this category of visa should also include foreign investors willing to invest in a Thai-based investment group in order to diversify their risk and secure equity interest in multiple startups.

The thresholds of THB 20M investment and THB 100M baht registered capital of the company receiving the investment, might more realistically be a cumulative total of all investments made by the individual (in the 10 industries). THB 20M is a high barrier and effectively prevents SMART Visa investments in smaller, innovative ventures. Why does it need to be invested all in one company? If the goal is to help motivate investor contribution to making a meaningful pool of capital available to multiple Thai startups, encouraging diversification would be an advantage.

We suggest also keeping investors’ perspectives in mind with regard to their other options. Why should a prospective investor apply for the Smart Visa when there are currently two other potentially applicable visa options: Investment Visa and Elite Visa (which does not offer a right to work)? Another point to consider is that most foreign angel investors currently prefer to invest in Thai startups via a

registered entity of that startup in either Singapore or Hong Kong. The Smart Visa (Investor and Startup) will likely remain less effective if the underlying reasons which result in that preference are not also adequately addressed.

As mentioned above in overall issues, the requirement to leave and apply for a new visa outside the country seems illogical, especially for an investor who may be a retiree with money, already in Thailand on a retirement (or other) visa. Why not encourage such people to become investors in the 10 industries, by letting them apply for a SMART Visa? Also, if already granted permanent residency, perhaps they could get a SMART Visa variant, without losing their PR status but enabling them to work legally (e.g. as a Director) for the company in which they are investing. If the aim is to encourage investment in the 10 sectors, why not open all avenues?

We understand that the THB 100m refers to registered capital not paid up capital.

*[Comment: the terms of the Smart Visa were clarified to allow investment in more than one company. The change was welcomed]*

### SMART Visa – Executive

(see overall points, above)

It would be helpful to clarify the target group for this category. If intended to cover not just CEO / CFO levels, but also other senior executives, then the 500,000 baht per month minimum salary requirement might be on the high side. Even for C-level roles, mid-size companies might be ruled out by this high minimum.

*[Comment: The minimum salary was reduced from 500,000 per month to 200,000 per month. The change was welcomed]*

### SMART Visa – Startup

As general issue, please see material above about people already in Thailand being able to apply. The requirement to leave and apply for a new visa outside the country seems illogical, especially for a Startup business initiator.

A big question for the Smart Visa – Startup is the ***Incubation Project Certificate***

Having considered the proposed process and objectives, we wonder if an Incubation Project Certificate as currently proposed is necessary.

Most foreign entrepreneurs entering Thailand, or those we would like to attract, are experienced and use their own capital for initial funding. They would have little or no interest in entering an incubator program, for example. Thus the appropriateness of having such an Incubation Project Certificate as a requirement should be further examined.

As we understand it, MOST will determine that the activity is in one or more of the ten 'S' curve fields. The fields are broadly drawn.

The approval process for Smart Visa - Start Up is not about seeking funding. Rather it is about ensuring that a startup proposal is genuine. Sufficient funds for personal support (the upfront THB 600,000 - see below) need to be shown and a company needs to be established within one year. If the company already exists, the entrepreneur needs some involvement – eg 25% equity or by being a director. Progress reports need to be shown.

The visa is only for one year initially, and can be extended up to 4 years.

Does the involvement of another agency really add value to the process?

**What are the criteria used by the National Startup Committee** to determine which parties are to be granted authority to issue an Incubation Project Certificate? Does the certifying organization have to currently operate an incubator program or an accelerator, or offer a funding program for start-ups? Would the National Startup Committee designate private interests to issue Incubation Project Certificates? Are there potential conflicts of interest that could develop for those entities with the authority to issue Incubation Project Certificates, such as a current operator of an incubation program or an agency with a funding program for start-ups?

We understand that one designated body is NIA, so for example (and this may also apply to others), NIA has both a fund and incubator; would it leave open a perceived conflict of interest if it were to recognize or validate a fund? Software Park Thailand has operated an incubator programme for several years but does not have a fund. DEPA recently announced a new funding program for startups but has no incubator.

Then, **what are the criteria to be used by a designated agency** in issuing an Incubation Project Certificate? Is this intended to be a type of filter to determine that the applicant has a good chance of success or to remove certain activities from consideration? Will the agency have any ongoing role? Which agency does the ongoing monitoring?

We would suggest that as the original visa is only for one year, and as it's acceptable for this category of Smart Visa that no funding is involved, market forces and the skill of the applicant are the best determinants and the ongoing monitoring should be 'light touch', simply to see that some progress is being made.

Another question is whether the applicant is required to apply or enter an incubation program in Thailand? If so, does the incubation program have to be public or private?

In many **cases more than one foreign entrepreneur** is involved with the same company – often in an equal or near-equal consortium. Evidence from previously successful startups in Thailand demonstrates that many of them had more than one foreign founder or business initiator.

It is our understanding that more than one qualifying person could receive a SMART Visa – Start-Up for a single company, provided that they meet all the other criteria and are either a Director or a 25% shareholder (or both). In such cases would a Start-Up visa be available if say two or more held in aggregate at least 49% for example (or were directors?)

We understand that **600,000 Baht** is based on 50,000 x 12 being a reasonable minimum annual amount to support living in Bangkok. A significant attraction for foreign entrepreneurs to relocate to Thailand

is the relatively low cost of launching a startup here. It's possible that being required to tie up 600,000 Baht capital in advance might deter some entrepreneurs who could otherwise potentially make significant contributions to the local startup ecosystem. One possibility might be to require evidence of half the funds up front and a progressive demonstration for the rest (eg the other half to be shown four months later).

It might also be worth considering that, unlike prospective applicants for the Talent and Executive Smart Visas categories, those applying for the Startup Smart Visa are far less likely to relocate with spouses and dependents. If spouse and dependents are included we note that the minimum amount for living expenses probably needs to be more – eg 30% higher.

With reference to the initial Smart Visa draft:

We would suggest translating “ผู้ริเริ่มรายใหม่” as “Business Initiator”

In col 4, item 2 in the Startup category, what is a “related project” (and see also question about NSC / NIA, above)

### **A Possible Fifth Smart Visa Needed**

As startups develop into more mature enterprises, an ecosystem of ongoing support for entrepreneurs becomes increasingly necessary. It would be counterproductive to force a maturing startup which has “graduated” and achieved a measure of success, to leave Thailand because there is no longer an applicable category for its initial business initiators, its talent pool, or its investors. Thus a visa covering this aspect would be useful.

We understand that a renewal beyond the initial period (eg four years) is possible and that transfer from one category to another is possible assuming requirements are met.

### **Other – Digital Nomad type**

Please see separate proposal for discussion where a personal visa is issued but only for one year initially - some risk is taken in allowing time for work. We suggest that the benefits to the economy would be valuable.

## **Appendix 7: 39 professions not open to foreigners.**

Under a 1979 Decree, there are 39 professions not open to foreigners.

Of these there were ten professions which were recommended by a workshop in September 2017 to be opened. But no foreigners were part of that deliberation.

- Labour work
- Agriculture, animal husbandry, forestry, or fishery
- Bricklaying, carpentry or other construction work
- Shop/Outlet attendance
- Cutting or polishing diamond or precious stones
- Mattress and quilt blanket making
- Shoemaking
- Hat making
- Dressmaking
- Pottery or ceramic ware making

Most did not appear however to be of major interest to the foreign business community. JFCCT has proposed the following as being of interest (mainly in professional services):

Agriculture  
Brokerage  
Auction  
Accounting, Auditing  
Architectural services.  
Civil Engineering  
Tour Guide  
Legal services but only about Arbitration

The situation is complex as each profession has its own professional bodies and rules, and sector-specific legislation apart from the 1979 Decree.

The ability to run a business to carry out the activity is restricted by List 3 (and possibly lists 1 or 2) of the Foreign Business Act. This is a separate (but related) issue.

## Appendix 8: Types of Law

### Types of Law: the 2015 DoE issuance and the 2017 Decree in context

*Useful to consider four different instruments or methods*

**Primary law/legislation:** example: Act of Parliament.

**Royal Ordinance** (or Decree or Declaration). Has same standing as primary law/legislation. A s. 44 Order is an order of the NCPO, technically not of the state, but it does have the force of law.

**Secondary or delegated legislation:** examples Notification, Regulation, enabled by the primary, made under a power in the primary law.

The secondary cannot be beyond the scope of the primary, if it is, it can be 'ultra vires' or beyond the power and usually void.

#### **Interpretations or Opinions**

The 2015 DoE issuance is just an interpretation of a primary law. It probably went as far as possible (exhausted the boundaries of interpretation), it did not change the law. "Notification" is also sometimes used (confusingly) to describe an interpretation or opinion.

A **Cabinet resolution** does not have a formal basis of law, but is often observed as if it did.