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The License for Hiring Foreign Workers in Indonesia

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ABSTRACT

The entry of foreign workers into Indonesia is one of the impacts of foreign investment in Indonesia to assist national development. The opportunity to utilize foreign workers (TKA) has significant impacts, both positive and negative impacts. In applying a normative judicial approach, this research is conducted to analyze the regulations to get license in hiring foreign workers and the law enforcement if there is any offense. Besides improving the investment climate, the philosophy of hiring foreign workers is to transfer knowledge from foreign workers to Indonesian workers. This research indicates that the regulations to get license in hiring foreign workers are currently easier than the previous regulations. On the other hand, supervision regarding offenses of permits to employ foreign workers has so far not been optimal. The government is expected to pay attention to the opportunities for Indonesian Citizens to get a job and take decisive action if there is any offense.

Keywords: Foreign Workers, Regulation, Supervision

INTRODUCTION

In order to accomplish national development, labor both of its actors and objective plays an important role. National development goals have been issued by the Law of Republic Indonesia¹. In order to promote national development objectives, relationships with other nations must be established in addition to maximizing the quality of current services at the national level. By definition, a foreign worker is any individual who is not an Indonesian citizen and who is capable of working both inside and outside the context of an employment relationship to generate goods or services that cater to the needs of the community.² The influx of foreign workers in Indonesia is one of the impacts of foreign investment entering Indonesia to assist national development. Indonesia as a member of the AEC (ASEAN Economic Community) and WTO (World Trade Organization) has a commitment to give freedom to foreign workers to work in Indonesia.

The phenomenon of utilizing foreign workers in the employment layer in Indonesia is something that has been existed for a long time, followed by Indonesian government's objective to support the investment climate which will lead to an improvement in the condition and the status of the state through cooperation with several foreign investors.³ Both good and negative effects of the possibility of hiring foreign workers are substantial. The comprehensive laws for licensing the employment of foreign workers are required in order to reduce the negative effects. This aims to limit the movement of certain individuals who smuggle foreign workers into Indonesia. The act of smuggling people across national borders is known as human smuggling, which is defined as the illegal entry of a person into the territory of a nation that the person is not a citizen or holds an invalid residence permit. This involves breaking the rules and obtaining the wrong permits that are necessary to enter the nation legally.⁴ In this instance, a person unlawfully entering the territory of another nation without a permit has the intention of working or being utilized to meet particular demands.

The utilization of Foreign Workers (TKA) is very necessary to support the investment and development climate in Indonesia. The mechanisms related to this case must be implemented formally and structured for the prospective Foreign Worker (TKA) has a valid permit. The government has attempted to create a juridical order as a regulation and policy on the mechanism of Utilization of Foreign Workers (TKA) with the aims that there will be no violations & disruption of social

¹Ahmad Jazuli, "Eksistensi Tenaga Kerja Asing Di Indonesia Dalam Perspektif Hukum Keimigrasian," *Jurnal Ilmiah Kebijakan Hukum* 12, no. 1 (2018): 89.

² Riza Fauziah Djazuli, "Dinamika Pengaturan Tenaga Kerja Asing Di Indonesia," *ADLIYA: Jurnal Hukum dan Kemanusiaan* 15, no. 1 (2021): 1–18.

³Ibid.

⁴ Siti Kunarti, "Analysis of the Content of Foreign Labor Use Regulations Against Indonesia's Labor Protections," *Jurnal Dinamika Hukum* 20, no. 1 (2020).

activities in the future.⁵ This regulatory policy is implemented in several laws and regulations, namely Law No. 11/2020 concerning Job Creation, Law No. 13/2003 regarding Manpower, Government Regulation No. 34/2021 about the Use of Foreign Workers, Minister of Manpower No. 10/2018 concerning Procedures for the Use of Foreign Workers, Minister of Manpower No. 8/2021 regarding Implementation Regulations of Government Regulation No. 34/2021 about the Use of Foreign Workers, and other regulations. This regulatory mechanism does not merely regulate how the implementation of work for Foreign Workers (TKA) who want to enter the territory of Indonesia, but also explains how the licensing mechanism for the implementation of work for Foreign Workers. One of the crucial steps prior to the implementation of certain items is licensing, which aims to ensure that all activity mechanisms operate smoothly and legally in accordance with Indonesian laws and regulations. Therefore, some juridical arrangements serve as the main guidelines in regulating the licensing and implementation mechanisms for each Foreign Worker (TKA) who will work in Indonesia.

According to Nyoman Mas Aryani et al, even though there are certain fields and types of work that must prioritize Indonesian workers, along with the use of foreign workers to a certain time limit to adopt foreign workers skills, the dynamics of regulation in various legal policies on the use of foreign workers, especially between law on employment and law on job creation. With regard to the employment of foreign employees, state protection, and adequate improvement in the quality and standard of competence for Indonesian workers, the prospective policy orientation outlined in this article is anticipated to be more selective.⁶ Meanwhile according to Ayu Putri, The worldwide pandemic has sped up government efforts to promote foreign investment in the archipelago. As a result, the nation's economy expands and gradually returns to normal. The tight competition for hiring between international and Indonesian national workers is one of the negative and beneficial effects of this action. If the government can make foreign investment its top priority in the future, it is appropriate. Nevertheless, it must also put an emphasis on Indonesian employees to protect their rights to acceptable employment and living conditions rather than turning them into slaves to foreigners in their own nation.⁷ Then based on Mahuli and Sianturi, the enactment of Law No. 13 of 2003 on manpower, provisions on foreign workers in Indonesia are no longer regulated in a separate statutory regulation, as they were in Law No. 3 of 1958 on placement of foreign workers, but are included in the compilation in the new regulation. Contains provisions governing foreign worker

⁵ Nevey Varida Ariani, "Penegakan Hukum Terhadap Tenaga Kerja Asing Ilegal Di Indonesia," *Jurnal Penelitian Hukum De Jure* 18, no. 1 (2018): 115.

⁶ Nyoman Mas Aryani, Ayu Putu Laksmi Danyathi, and Bagus Hermanto, "Legal Policy Dynamics of the Foreign Workers in Indonesia: Should It Be Justified?," *Kertha Patrika* 44, no. 1 (2022): 1–25.

⁷ Ayu Putri Rainah Petung Banjaransari, "Regulation of The Use of Foreign Workers in Indonesia After The Job Creation Act: Problems and Solutions," *Constitutionale* 3, no. 1 (2022): 43–58.

employment. However, many obstacles remain in the way of implementing the new law, particularly in boosting investment, as some laws required for the seamless employment of foreign workers have not been fulfilled. Together with the other three Permenakers, the new Ministerial Regulation Number PER.02/MEN/III/2008 on Procedures for the Usage of Existing Foreign Employees was released to fill the regulatory gap. Yet, the previous rules continue to be in force. The placement of foreign workers may start after the Ministry of Manpower and Transmigration approves foreign worker planning (RPTKA) and issues a permission to employ foreign workers. To work in Indonesia, a foreign worker must possess a restricted stay permit (KITAS) granted by the Directorate-General for Immigration, Ministry of Law and Human Rights. Governments and private businesses should send highly qualified specialists to Indonesia to aid in its economic and technological development. Management and professional technology transfer for migrant employees from Indonesia must be closely watched and accredited.⁸

Use of non-target foreign workers and smuggling of foreign workers with the goal of minimizing costs are cases of licensing regulations that are frequently violated. An example of this is the case of PT Lafarge Cement Indonesia (LCI) in Aceh, which smuggled 51 foreign workers from China and all of its activities were found to be illegal and in violation of Indonesian legal regulations, because PT Lafarge Cement Indonesia (LCI) admitted that it did not have permits for all employees of foreign workers (TKA) when investigated by the Manpower Office (Disnaker). Based on the previous cases, there are two problems statement in this research, how is the regulation of licensing to employ foreign workers (TKA) and the law enforcement mechanism against violations of licensing regulations for the foreign workers employment. The objectives of this research is to find out the implementation of regulation in qualifying the foreign workers and the law enforcement mechanism against violations of licensing regulations for the foreign workers employment.

LITERATURE REVIEW

License

According to Big Indonesian Dictionary, license is a statement of granting (not prohibiting etc.); approval allows (Department of Education and Culture, 1989). Permit is an approval from the authorities based on laws and regulations to allow certain actions or acts that are generally prohibited. Spelt and Berge argue that a permit is an approval from the authorities based on laws or government regulations to in certain circumstances deviate from the prohibited provisions of laws and regulations. According to Spelt and Ten Berge, it can be understood that a party cannot do something unless it is permitted. This means that the possibility

⁸ Jenda Ingan Mahuli and Pantas Sianturi, "Regulation of the Employment of the Foreign Workers," *International Journal of Multicultural and Multireligious Understanding* 8, no. 6 (2021): 56–60.

for a party is closed unless permitted by the government. Thus, the government binds its role in the activities conducted by the party concerned.

Licensing serves the regulatory function and the orderly function. The main tool of law in governance is licensing as a regulatory function, while licensing as a disciplinarian is meant to ensure that activities within the community do not conflict with one another. Licensing has the function of regulating and supervising specific activities that the rules must be followed by relevant parties or authorized personnel. A license is essentially a decision made by an authorized state administrative official or organization that contains or refers to the following:

- a. Free license, which is a permit as a state administrative decision that the issuer is not related to written rules, laws and organ authorized. It also has a large degree of freedom in deciding to grant the license.
- b. Permit is governed by written and unwritten rules and regulations, the authorized organ in permission has varying degrees of freedom and authority depending on how much the law regulates it. A license is a state administrative decision is bound by these rules and laws.
- c. Favorable license is one in interested party's benefit. The decision is the focal point that accords grace to those involved in permits that are favorable in content.

Foreign Labor (TKA)

In etymology, labor is a person who works or does something, or a person who is able to do work both inside and outside the employment relationship. In Economic dictionary, labor is known as an element of the population that helps society by providing a combination of physical energy and intelligence to the productive process. According to the Law of Republic Indonesia Number 13/2003 concerning Manpower Article 1, the definition of labor is everyone who is able to work both inside and outside of labor relations in producing goods and services for the purpose of meeting community needs. The article also states the definition of foreign labor is a "foreign labor is a foreign national holding a visa with the intention of working in Indonesia territory". Any person who is not an Indonesian citizen and is able to work, both inside and outside of employment ties in order to generate goods or services to meet the needs of the community is also referred to as foreign labor.

Employing foreign employees in Indonesia serves the objective of supplying skilled labor where Indonesian workers are unable to fill particular positions. Despite the fact that businesses in Indonesia are expected to hire local professionals, it intends to increase foreign investment as a support for national growth in that country. According to Budiono, the placement of foreign workers in Indonesia has several objectives, called:

- a. Supplying the demand for qualified professionals in specific industries where Indonesian migrant laborers are unable to fulfil it.

- b. Accelerate the process of national development by accelerating the process of technology transfer or knowledge transfer, especially in industrial sector.
- c. Provide expanded employment opportunities for Indonesian Migrant Workers (TKI).
- d. Increase foreign investment to support development capital in Indonesia

RESEARCH METHODOLOGY

This research is conducted using a normative juridical approach based on primary legal materials by examining theories, concepts, legal principles and laws and regulations related to this research. Normative juridical research provides a qualitative analysis of discussed material by analyzing theories, legal principles, and law.⁹ The data collection method used is document or literature study, which is conducted by collecting, identifying and classifying legal materials related to Licensing of Foreign Workers in Indonesia.

RESULT AND DISCUSSION

Implementation of Regulation on Employment of Foreign Workers

According to World Bank data, Indonesia is the fourth most populous country in the world. Although having a sizable population, Indonesia is a developing nation with generally limited human resources. Since the technology is constantly evolving, this is undoubtedly a concern in the labor market. One of the solutions to overcome this problem is to bring in foreign workers. The entry of foreign workers is not only to help national development, but also a form of Indonesia's commitment as a member of the AEC (ASEAN Economic Community) and WTO (World Trade Organization). To minimize the negative impact of the use of foreign workers, a regulation on licensing the employment of foreign workers is required.

In early 2020, the Government is preparing a Job Creation Bill using the Omnibus Law concept. According to Constitutional Law Expert Fahri Bachmid, in legal science, the concept of "omnibus law" is a concept of legal products that serves to consolidate various themes, materials, subjects and laws and regulations in each different sector into one large and holistic legal product.¹⁰ The Job Creation Bill was amendment on November 20, 2020 which became Law No.11/2020. In formal test of Law No.11/2020, the Court stated that the law was conditionally unconstitutional. The advantages and disadvantages of this law have been widely debated in the public, particularly in the labor sector, one of which is the issue of license for hiring foreign workers.

⁹ Fairus Nur Fitriana and Herma Setiasih, "The Enforcement of Wanprestasi on Debt Recognition in Debt Agreements A Case Study of District Court Decision No. 9/Pdt.G.S/2021/Pn.Srl," *YURIS (Journal of Court and Justice)* 1, no. 4 (2022).

¹⁰ Ariani, "Penegakan Hukum Terhadap Tenaga Kerja Asing Ilegal Di Indonesia."

Previously, the regulation on foreign workers was regulated in Chapter VIII of Law No.13/2003 on Manpower. Article 42 of Law No.13/2003 states that every employer who employs foreign workers must have a written license from the Minister or a designated official. The written license is the Plan for the Use of Foreign Workers (RPTKA) and the License to Employ Foreign Workers (IMTA). The provision refers to Ministerial Regulation No.2/2008 concerning Procedures for the Use of Foreign Workers. However, after the enactment of Law No.11/2020 on Job Creation, there are changes related to licensing the employment of foreign workers. Article 42 of Law No.11/2020 states that every employer who employs foreign workers must have a plan for the foreign workers authorized by the Central Government. The provision is also contained in Article 6 Paragraph (1) of Government Regulation No.34/2021 concerning the Use of Foreign Workers which states that every foreign worker employer who employs foreign workers must have an RPTKA authorized by the Minister or a designated official. The Plan for the Use of Foreign Workers, hereinafter abbreviated as RPTKA, is a plan for the foreign workers in certain positions for a certain period of time. In obtaining the RPTKA authorization, the foreign employers must submit an application for RPTKA authorization to the Minister or a designated official by online. The provisions regarding the procedures for applying for RPTKA authorization are contained in the Government Regulation No.34/2021.

In addition to Article 42, which simplifies the requirements for hiring foreign workers in Indonesia, there are other articles that are considered to undermine the rights of Indonesian citizens to obtain the employment in Indonesia. These articles include Article 44 and Article 46 of Law No.11/2020 on Job Creation. Article 44 of Law 11/2020 removes provisions related to positions and applicable competency standards, while Article 46 of Law 11/2020 removes provisions limiting positions for foreign workers in Indonesian companies. These provisions were previously contained in the Manpower Law. The chances for Indonesian citizens to get employment in Indonesia are negatively impacted by the deletion of these articles, which is not in line with Article 27 Paragraph (2) of the Constitution of Republic Indonesia, which states that every Indonesian citizen has the right to work and a livelihood worthy of humanity. In addition, Article 4 of Presidential Regulation No. 20/2018 states that every foreign worker employer must prioritize the Indonesian workers in all available positions. This provision seems to be just a formality with the abolition of Article 44 and Article 46 of the Labor Law. This is due to the fact that despite all of the limits in the previous rule, there are still a lot of infractions.

The Indonesian Ministry of Manpower (Kemnaker) noted that throughout 2016 there were 74,183 foreign workers in Indonesia as of November 2016 with china had the largest number of foreign workers at 21,271, followed by Japan at 12,490 and the Republic of Korea at 8,424 workers. Based on the results of the inspection of foreign workers conducted by Ministry of Manpower at central and regional levels from January 2016 to December 2016, from the 69 companies

inspected, there were 1,324 violations of foreign workers (central and regional) (Without IMTA = 794 people, and Abuse of Position = 530 people).¹¹ Based on this data (occurred before the enactment of Job Creation Law) there have been many violations. On the basis of this information, we can create an example of what would happen when the regulations governing the permit to employ foreign workers are loosened. The issues related to employment are still a major problem for Indonesia as a developing country. Based on data released by World Bank, Indonesia has the fourth-largest labor force or workforce in the world.¹² This indicates that Indonesia's labor force has increased significantly along with its population. Based on data from BPS, the Indonesian labor force amounted to 122,742,601 people, and increased to 125,316,991 people in 2014. In this situation, the government must use its resources as efficiently as possible for developing the country; otherwise, the economy would be burdened by an ever-increasing labor force that cannot be absorbed, which will eventually cause a crisis.

Although improving the investment climate in Indonesia is the general goal or idea behind modifying the regulations governing employment licenses for foreign workers, this does not imply that citizens' rights would be ignored. The use of TKA should be aimed at transferring knowledge with a certain period of time, not an unlimited period of time. The investment through foreign investors is still required, but it must be balanced with developing and appreciating the potential of the nation's generation, as a form an independent Indonesian state in various sectors. In addition, the rights between foreign workers and migrant workers should not be inversely proportional. Between the two, the government should pay more attention to migrant workers. One of the goals is to avoid the nation's generation with various potentials that choosing to develop their potential in other countries because they feel unappreciated in their own country. Such cases are not common cases in Indonesia. One of them is Dr. Eng. Khairul Anwar with his work, which is the innovator of 4G LTE mobile generation that was developed in Japan. The results of his work are used and developed in various countries.

Supervision and surveillance of foreign workers in Indonesia

One of the causes of the many violations that occur in relation to the license to employ foreign workers is due to a lack of supervision. Indonesia itself has implemented clear regulations in terms of the use of foreign workers by companies. The sanctions for violators have been stipulated in the Labor Law, which can be in the form of criminal sanctions and administrative sanctions. In order to reduce the negative effects of foreigners' arrival, stay, and their activities in Indonesia until their departure from Indonesian territory, one of the immigration functions conducted is the supervision of human traffic. This function is crucial and

¹¹ Jazuli, "Eksistensi Tenaga Kerja Asing Di Indonesia Dalam Perspektif Hukum Keimigrasian."

¹² Kim Moloney, *Who Matters at the World Bank? Bureaucrats, Policy Change, and Public Sector Governance*, First Ed. (Oxford: Oxford University Press, 2022).

strategically important and at the same time has a positive impact in creating the continuity of national development.¹³ The lack of maximum supervision conducted by Foreigner Supervisory Team (TIMPORA) and the Task Force is considered to be one of the causes of the increase of violations, especially in cases of foreign workers who do not have a Foreign Worker Employment Permit (IMPTA).¹⁴ In accordance with Article 69 of Law No.6/2011 regarding the immigration, immigration control includes supervision of Indonesian citizens and foreigners. The supervision of foreigners, including supervision of the presence and activities of foreigners in Indonesia territory is the duty and function of TIMPORA, which consists of various government agencies and institutions. Some of the factors that cause the lack of maximum supervision by TIMPORA include the lack of assertiveness of *Pora* Team towards the violations, the limited number of human resources supervisors, budget limitations, and poor coordination between agencies both central and instances.

Until now, 97% of TIMPORA has been formed from the central level to sub-district level. Local governments, which are also TIMPORA members, have resources/instruments that reach out to rural areas, from the provincial level to RT/RW (529 districts/cities). The community should be educated on how to participate in monitoring the presence and actions of foreigners in their neighborhood for the information may be conveniently monitored by the local government, which is a member of TIMPORA. The success of TIMPORA is influenced by several factors, called the high knowledge of the apparatus in optimizing the implementation of supervision of foreigners. The level of understanding of the apparatus regarding duties and functions also greatly affects the success of supervision. Clear SOPs that prioritize the interests of supervisory implementation determine whether the supervisory efficiency and effectiveness are achieved or not.

Related to the supervision of foreign workers, it must also be applied when checking the administrative documents of foreign workers in border areas to minimize the infiltration of illegal foreign workers. The double checking is needed to further check the data authenticity belonging to foreign workers. In comprehensively monitoring TKA, the role of the community is needed. When there are any infractions by businesses that hire foreign labor, the public should be given a place to report them. Before that, the community should be educated about the license to hire foreign workers or the warning signs of violations of the license to employ foreign workers.

The Task Force and TIMPORA's actions are considered as less assertive and have not had a significant deterrent effect on violators. As a result, the regulations

¹³ Tony Mirwanto, "The Problem of the Supervision of Immigration Stay Licenses on Illegal Foreign Labor Working in Foreign Capital Investment Companies in Indonesia," *Jurnal Ilmiah Kajian Keimigrasian* 1, no. 2 (2018): 13–24.

¹⁴ Mahuli and Sianturi, "Regulation of the Employment of the Foreign Workers."

that are clear and precise about the responsibilities of TIMPORA and the Task Force in applying sanctions as well as the number of supervisory personnel should be made. The supervision of foreign employees should be based on a strong sense of patriotism and a commitment to uphold the national interests because it is easy for the temptation of a large number of money to influence this sector.

CONCLUSION AND SUGGESTION

Conclusion

Based on the results of the research described, the researcher conclude two conclusions, such as (1) the licensing of foreign workers is easier by Job Creation Law, that the foreign workers only need an RPTKA. In addition, in the latest regulation, there are articles that can harm the rights of Indonesian citizens regarding the employment opportunities; and (2) the supervision related to violations of licenses to employ foreign workers has not been maximized as evidenced by the large number of violations of licenses to employ foreign workers.

Suggestion

Based on the conclusions that have been drawn, the researchers suggest that in making regulations for foreign workers to work in Indonesia, the Government should also really pay attention to the opportunities for Indonesian citizens to get jobs, so that native Indonesians do not have the opportunity to work in Indonesia due to the increase in the number of foreign workers. The supervisory apparatus is expected to take firm action against any violations. In addition, it is necessary to increase the competence of the authorized apparatus in terms of supervising foreign workers.

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