

# **The Good, the Bad, and the Ugly about Decree 46/2011 ND-CP effective 01<sup>st</sup> of August 2011**

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# THE GOOD

- **BROADER SCOPE OF WORK PERMIT EXEMPTION:**
  - Chiefs of representative offices, chiefs of project offices, representative of foreign NGOs in Vietnam
  - Intra-corporate transferees in 11 sectors in Vietnam's WTO Specific Commitments
  - Foreigners with information and press activity permits issued by Ministry of Foreign Affairs
  - Technical and professional specialists of an ODA-funded project

...are **EXEMPT** from work permits!

# THE BAD

- **VISA** for a foreigner: only issued **after** work permit, work permit extension or re-issuance of work permit.
- **Six months** after effective date of Decree 46 (01 August 2011): Foreigners working in Vietnam **without work permits or applications for work permits** shall be **EXPELLED** from Vietnam.

# THE BAD

- **INTRA –CORPORATE TRANSFEREES** working for pure manufacturing companies or service suppliers **NOT** covered by Vietnam’s WTO Specific Commitments: Are **NOT EXEMPT** from work permits.
- **SPOUSES of diplomats or members of consulate posts** working in companies and organizations in Vietnam **must obtain work permits.**

## ... AND THE UGLY

- **Ugly No. 1: Recruitment process with Vietnamese first before offering position to foreigners:**
  - **Article 1.3 and 1.9** : 30 days prior to recruitment of foreigners, employers must publicly announce recruitment demands to Vietnamese about positions that they expect to hire foreigners in national and regional newspapers. Companies must present documents evidencing that they have advertised recruitment demands for Vietnamese about these positions in their applications for work permits for foreign employees.

# ... AND THE UGLY

- **WHAT'S WRONG?**

- **Recruitment process** can be **PROLONGED** because it applies to all foreign employees, including top executive and technical experts.
- Companies can be **SUED by Vietnamese applicants** if they do not conduct further time-consuming recruitment processes, e.g. - resume screening or interview.
- Can **VIOLATE** Vietnam's guarantee of the right of companies to engage top managerial personnel of their choice regardless of nationality under **Article 8.2 of US – Vietnam BTA**.

## ... AND THE UGLY

- **UGLY NO.2: APPRENTICESHIP CONTRACT WITH VIETNAMESE FOR WORK PERMIT EXTENSION**
  - **Article 1.13:** in order to **extend work permits for foreign employees**, companies now have to submit **copies of apprenticeship contracts with Vietnamese employees** expected to substitute the relevant employees.

# ... AND THE UGLY

- **WHAT'S WRONG?**

- Drafters confuse “apprenticeship contract” and “training contract”: an apprenticeship contract is only signed with an apprentice to provide him with basic knowledge for a low-skilled jobs. E.g. – can sign an apprenticeship contract for a person to become a janitor or textile worker but NOT to become a CEO or CFO!
- **INCONSISTENT** with **Article 132 of the Labor Code**: only requires FIEs to have **plans and programs** to train Vietnamese employees to substitute foreigners.

## ... AND THE UGLY

- Can **VIOLATE Article XVI (1) and XVI (2) (d) of GATS and Vietnam's WTO Specific Commitments.**
- Companies face **risks of contracting apprenticeship with Vietnamese employees.** Vietnamese employees targeted as substitutes for foreigners may have to convert their employment relation to apprenticeship relation!

# WHAT CAN YOU AND WE DO?

- FIEs: Cooperate via your foreign business associations and chamber, trade-commission and your Embassy to raise “YOUR” concerns to the government over the new Decree 46 . Express to the government that companies’ ultimate goal is to hire people to run your business efficiently and it **CANNOT replace the weak Vietnamese Education System to produce a high skilled labor force!**
- **Note: Petitions jointly signed by a number of business associations and chambers have been submitted to the Prime Minister in week 29/30 by end of July 2011. All Foreign Business Associations and Chambers acted united on that!**

# WHAT CAN YOU AND WE DO?

- **Negotiators of FTAs with Vietnam:** Negotiate with Vietnam on (i) extension of service sectors entitled to market access rules more liberal than, or at least similar to, those of GATS; (ii) freedom of companies (both foreign parent company and their subsidiaries) to select managerial personnel regardless of nationality, and (iii) no limitation of the number of managerial and high skilled foreign employees foreign invested companies are entitled to hire.
- **Seeking when problems for you arise advice from your business association/chamber/trade-commissioner and if necessary excellent legal assistance from your local attorney!**