



## COMMENTS TO DRAFT CIRCULAR DETAILING DECREE No. 102/2013/ND-CP DATED SEPTEMBER 5<sup>th</sup> 2013 OF THE GOVERNMENT

Ho Chi Minh City, 30 December 2013

### Documents for comments:

- Draft Circular guiding the implementation of a number of articles of Decree No. 102/2013/ND-CP (*'Draft Circular'*)
- Decree No. 102/2013/ND-CP dated September 5<sup>th</sup> 2013 of the Government detailing the implementation of a number of articles of the Labour Code regulating foreign nationals working in Vietnam (*'Decree 102'*)

ARTICLES	CONCERNS
<p><b>Draft Circular, Article 3, Clause 1:</b> On an annual basis before December 1st, employers (except for contractors) with demands on the employment of foreign nationals must submit a written report as regulated in clause 1 Article 4 of Decree No. 102/2013/ND-CP on these demands as of last year to <b><i>the Department of Labour, Invalids and Social Affairs in provinces and central-affiliated cities</i></b> (hereinafter referred to as Department of Labour,</p>	<p>1) We are concerned about this new regulation in general, because it tightens unnecessarily control on foreign workers, while the current regulations are already heavy and complicated more than enough for companies employing foreigners. It looks like Vietnam is creating more obstacles to FDI contrary to the political will to open the country to the world. It is suggested to eliminate this requirement.</p> <p>2) This clause should clarify that the employers submit reports <b>to DOLISA only</b></p>



<p>Invalids and Social Affairs – DOLISA) <b>where the employers’ headquarters are based.</b></p>	<p>and receives approval by People’s Committee <b>via DOLISA only</b>; in other words, employers do not directly contact People’s Committee.</p> <p>That point should be emphasized because Article 4 of Decree 102 makes readers understand that employers are required to directly submit the report to People’s Committee.</p> <p>3) This clause should clarify whether the report includes the employment demands for the branches/ rep offices <b>located in another city or province</b>. For example, can HCM City DOLISA receive and get approval for the employment demands in Da Nang or Ha Noi?</p>
<p><b>Draft Circular, Article 3, Clause 4:</b>  <b>Before January 15<sup>th</sup> annually</b>, DOLISA shall release a written notification regarding each position allowed for the employment of foreign nationals for each employer as per the approval of provincial-level People’s Committee,</p>	<p>1) We have doubt that any People’s committee in big cities like HCMC, Hanoi, Danang, Haiphong... is able to validate in proper way the request regarding foreigners hired for each company. There are too many companies and too many different positions that they may need every year. Therefore, we wonder about authorities’ capability to understand in-depth such business reality so as to approve.</p> <p>We are very concerned that the new measure will just lead to administrative burden, and delays in receiving approval involving issues for company’s operations.</p> <p>2) This clause should indicate also the <b>schedule of approval notification for employers’ supplement report</b>, if any (the report following Form No. 2 as mentioned in Clause 2 of this article).</p>



<p><b>Draft Circular, Article 5, Clause 2:</b></p> <p>A health check document as stipulated in clause 2 Article 10 of Decree No. 102/2013/ND-CP prepared <i>in compliance with the Ministry of Health's regulations</i>.</p>	<p>This clause should indicate which regulations written in which document.</p>
<p><b>Draft Circular, Article 5, Clause 3 a):</b></p> <p>In case the foreign nationals have stayed in Vietnam <i>before</i>, it is required to have a criminal record issued by a Vietnamese authority <i>and</i> a document proving that these individuals neither commit any crimes nor face any criminal prosecution in accordance with the foreign country's laws issued by an authority of this country</p>	<p>“Before” is not clear enough; the clause should indicate <b><u>for how long</u></b>. 06 continuous months? 6 discontinuous months? Or...? And the clause should indicate <b><u>the authority to issue the criminal record</u></b> (for example, Justice Department).</p> <p>Decree 102/2013 does not indicate the requirement for both documents (one issued in Vietnam and one issued in the foreigner's country). Decree 46/2011 requires only one of those 2 documents (i.e. only the criminal record issued in Vietnam).</p> <p>→ Why should this Circular require both 2 documents instead of only 1 as per the regulation in recent years? It will be more reasonable and acceptable to the employers and foreign laborers if the current regulation is kept: <b><u>to provide only one document (criminal record in Vietnam only)</u></b>, not both one issued in Vietnam and one issued overseas.</p>
<p><b>Draft Circular, Article 5, Clause 3 b):</b></p> <p>In case the foreign nationals have never stayed in Vietnam, it is required to have a document proving that these individuals neither commit any</p>	<p>The clause should indicate “the foreign country”. Is it the country where the foreigner holds the nationality, or the country where he/she lived for a period of time (should indicate how long the period is) before relocating to Vietnam?</p>



<p>crimes nor face any criminal prosecution in accordance with <i>the foreign country's</i> laws issued by an authority of this country</p>	
<p><b>Draft Circular, Article 5, Clause 4 b):</b>          For those who are specialists, it is required to have a document <i>recognised by the authorities</i> certifying that these individuals are specialists or a document proving that these individuals are specialists and suitable for the positions they are supposed to hold in Vietnam.</p>	<p>What type of document by which authorities is expected to be provided?</p>
<p><b>Article 5</b></p>	<p>It will be clearer and more comprehensive if this circular mentions <u>items 5, 6, 7, and 8 in Article 10 of Decree 102</u> as well.</p>
<p><b>Draft Circular, Article 7, Clause 2:</b>          Change of workplace address as stipulated in clause 2 of this Article is a change when the employers appoint, move, or delegate the foreign nationals to work full time at another branch, representative office or establishment of the employers which is located within the same province, city.</p>	<p>For example, a university's staff moved from teaching in one campus to another will be considered as a new staff to new workplace. The work permit cannot be lodged for re-issuance for that reason --&gt; Have to apply for a work permit for new employee at the new workplace. In case, due to these transfers, the number of employee increases over the registered number to People Committee.          We would request an expedited or simpler process for the current work permit to be re-issued for the new location (same position) and to have the process to reduce the overall foreign labour total in one location and add it to another location so that the overall total of foreign hires remains the same, and this would not be counted as an 'additional demand for hiring' (requiring the process</p>



	of advising DOLISA 10 days prior etc) but for the process to allow a re-assignment.
<p><b>Draft Circular, Article 13, Clause 5:</b></p> <p>To fully execute a labour contract signed with a foreign national working in Vietnam as regulate by the laws. To submit a written notification on the conclusion of the labour contract, together with a copy of the signed labour contract and a copy of previously issued work permit, to the DOLISA which previously granted this foreign national with work permit.</p>	<p>This is applicable only in the form of employment not for an assignment where there is no labor contract.</p> <p>Further specification is required.</p>
<p><b>Draft Circular, Article 13, Clause 9 a):</b></p> <p><i>Investors</i> to report periodically before the 5<sup>th</sup> of the first month in every quarter to DOLISA ...</p>	<p>The clause should indicate who can sign the document on behalf of the Investor. Can the legal representative of the Investor (the one whose name is on the Investment Certification) sign this report? Or can the legal representative delegate some other managers to sign this report?</p>
<p><b>Decree 102, Article 7, Clause 1</b> refers to the cases in which foreign nationals are exempted of work permit and that includes clause 4 article 172 of the new labor code 10/2012/QH13: “Foreigner coming to Vietnam with a period of less than 03 months to offer services”.</p>	<p>Could the circular provide clarification and guidance on this? Does “services” include intangible services such as training, consulting, auditing, after-sales services (for software/hardwareproducts)?</p>
<p><b>Decree 102, Article 10, Clause 8 e):</b></p>	<p>What document will exactly be requested from the overseas company which is</p>



<p>The foreign workers mentioned in Point h Clause 1 Article 2 of this Decree must have the paper made by the service provider that sends the foreign workers to Vietnam to establish its commercial presence.</p>	<p>establishing commercial presence in Vietnam? This should be specified in the guiding circular.</p>
<p><b>Decree 102, Article 14 on the Procedure for re-issuing the work permit</b></p>	<p>The Eurocham HR committee had highlighted the issue of not accepting Work Permit <b><u>renewal applications more than 15 days</u></b> vs 30 days (as before) <b><u>before its expiry date</u></b>. This is a critical timing issue, as in many situations, companies won't have enough time to extend visa / temporary Residence Card for the expatriate and family members on time. It is expected to have a clause in the circular to offer more flexibility in case of critical timing issue.</p>
<p><b>OTHERS</b></p>	<p>The new draft circular still does not bring anything new regarding foreign nationals working in Vietnam on very short term missions and this is a concern for many international enterprises bringing experts from overseas for an expertise or for quality audit, install equipment, or provide training to local employees for couple of days or weeks. Requesting these foreign nationals to obtain a work permit is unreasonable and as per the current law, they are not entitled to conduct these activities on Business visitor status only.</p> <p>No timeframe is specified as when the People's Committee will respond and issue the approval letter after DOLISA sent the request for recruitment of foreigner from companies.</p> <p>Some of our questions concerning the <b>Draft Circular for the 102 Decree</b></p>



concern provision of Documents for work permits. The context is an employer in the Education Sector who engages (new hires or renewal of contracts) for approximately **200** foreign workers at a specialist/ manager / professional/ expert level per calendar year.

We need to clarify what documents are required for these cases which are not covered/not clear in the Draft circular:

1/. **Change of position or title in the valid work permit:** A foreigner who has been issued with a work permit which is **valid**, who wishes to work for **the same enterprises ( apply to work for the same company again and internally transferred)** at a **different position** to that written in the work permit. E.g. Lecturer re-employed to a higher/same level lecturer role in the same school.

**Can we avoid having to get a new Work Permit for an internal transfer? Or** can we have an expedited process for the current Work Permit to be re-issued with just a title change?

2/A foreigner who has been issued with a work permit which is **currently valid** and who wishes to work for other enterprises at **the same position** written in the work permit

3/ A foreigner who has been issued with a work permit which is **currently valid** and who wishes to work for other enterprises at the **different position** written in the work permit.

4/. A foreigner who has been issued with a work permit which is **currently**



**invalid**, annulled and who wishes to work for other enterprises at the **same position** written in the work permit.

5/. A foreigner who has been issued with a work permit which is **currently invalid**, annulled and who wishes to work for **the same enterprises (resigned and apply to work for the same school again)** at the **same position** written in the work permit. E.g. Lecturer re-employed the following semester after a break.

6/. A foreigner who has been issued with a work permit which is **currently invalid**, annulled and who wishes to work for **the same enterprises (resigned and apply to work for the same school again)** at the **different position** written in the work permit. E.g. Lecturer re-employed to a higher/different lecturer role in the same school.

7/ **Education Sector:** How do we determine the categories in the Labor code (e.g. Are Lecturers/Teachers Specialists? And if Lecturers are specialists then what is the document recognised by the authorities that would be acceptable to 'certify that these individuals are specialists. It is still unclear, and therefore would potentially be interpreted differently by each province. Is it a Degree in Teaching; or a MBA/higher qualification in their subject matter.