

The Implication of Juridical and Sociological Existence of Foreign Labor in Indonesia

Ibnu Affan

Lecturer of Law Faculty of Islamic University of North Sumatra

Keywords: Implication, juridical and sociological existence, foreign labor.

Abstract: The multilateral relationship of our country to the countries of the world in the current era of globalization has opened the tap for the entry of foreign workers (*TKA*) in Indonesia. The use of foreign workers cannot be avoided, but in principle the use of foreign workers are those that are needed in 2 (two) terms: those who bring capital (as investors) and/or bring skills for transfer of knowledge or transfer of technology transfer of technology). In addition to these two things, in essence, it is not allowed. If we observe the laws and regulations governing foreign workers in Indonesia, then the entry of foreign workers in our country is not necessary to worry about. Our regulations have restricted the use of foreign workers only in working relationships for certain positions and at certain times of the year. Therefore, the government has issued a number of legal instruments ranging from licensing, health protection coverage to the supervision. Departing from that, when there are foreign workers who enter Indonesia do not follow the applicable legal procedures, they can be qualified as illegal foreign workers. Juridical implications for illegal foreign workers not only affect the foreign workers themselves, but also have legal implications for employers. The Manpower Act (*UUK*) has affirmed criminal sanctions to the employer as regulated in Articles 185 and 187 of the Manpower as well as administrative sanctions in accordance with the provisions of Article 190 of the *UUK*. The presence of foreign workers in the national economy of a country is sociologically also intended to create competencies which in turn will create efficiency and increase economic competitiveness. Thusthere is no other way our labor should be ready to compete in the midst of global markets. Increased competence becomes the absolute thing to win the competition in the labor market.

1 INTRODUCTION

Globalization of the world economy has affected almost every aspect of domestic and international economic relations. The growth of international trade, massive international financial flows, and the activities of multinational corporations are increasingly binding on the national economy to one another, all of which make globalization an important and increasingly controversial feature in world economic development (Agusmidah, 2011, p. 246).

Indonesia as a developing country in essence cannot be separated from various forms of social phenomena that exist. Facing the development of the world with technological sophistication and influential information also in the economic sector economic globalization has been programmed in the national development agenda by creating employment for the people's welfare in the plan of

improving the labor climate. Recognizing that development carried out by the Indonesian people aiming to build a complete Indonesian people and the welfare of the community is all necessary to restructure the various aspects of community life in social and economic fields, especially in working relationships (Naning, 1983, p. 183).

Establishment of big companies in this country is one of the supporting factors that is very instrumental in the process of nation building that is being undertaken. The employment issue is an ever-present problem, and will remain with respect to the establishment of the company. Therefore, labor is the most dominant factor in a company. The need for professional experts and the need for appropriate technologies are needed to support a work process, making private companies, whether foreign private or national private use foreign workers (*TKA*) as their workforce with the priority to use labor local.

Indonesian Workers (*TKI*), one of the human resources as the driving force of development must have a productive work ethics, skilled, creative, disciplined and professional and be able to utilize, develop and master science and technology. But in reality the existing *TKI* cannot fully master the science that continues to grow. The scarcity of our workforce with the quality that suits the needs formation in some job sectors have high difficulty level or require special skills and it is not easy for our workforce to meet these qualifications. This is a factor that encourages the use of foreign workers in Indonesia (Randang, 2011).

Foreign Investment Issues (*PMA*) are also getting crowded. This is given that for the sake of national development it requires a lot of funds. Funds needed for investment cannot be sustained by the government and the national private sector alone. This situation is increasingly encouraging to seek as much as possible to attract foreign investment to Indonesia (Anoraga, 1995, p. 46).

Through *PMA* with many advantages, and its permanent and long-term nature, also contributes to technology transfer, transfer of management skills and creating new jobs. Employment is important to note that the problem of providing employment is a problem that is quite dizzying to the government (Ibid). The presence of foreign investments and *PMDN* (Domestic Investment) has allowed the entry or use of foreign migrant workers (Syarif, 1996, p. 2).

The opening of the opportunity for the use of foreign workers began when Indonesia became part of the world community as part of the Asia Pacific Economic Cooperation (APEC) Asia Economic Cooperation (1986), member of the Asean Free Trade Area (AFTA) Asean Free Trade Organization in 1992, World Trade World WTO (1995 World Trade Organization), providing a great opportunity for the entry of foreign workers in Indonesia.

The use of foreign workers is unavoidable in the current era of globalization. However, in principle the use of foreign workers is needed in 2 (two) terms: those who carry capital (*TKA*) that bring capital (as investors) and/or bring skills in terms of transfer of knowledge or transfer of technology. In addition to these two things, it is essentially not allowed and should prioritize the use of *TKI* (Sumarprihatiningrum, 2006, p. 57).

The purpose of the use of foreign workers is to meet the needs of skilled and professional workers in certain fields that cannot be filled by our workforce accelerating the process of national development by accelerating the transfer of science

and technology and increasing foreign investment as development support in Indonesia. However, the use of foreign workers should be implemented selectively in order to optimally utilize the Indonesian workforce. As a consequence of globalization and liberalization of trade and investment, such as direct foreign direct investment, the number of foreign workers working in Indonesia tends to increase over time.

2 LEGAL RULES FOR USE OF *TKA*

To be able to use foreign workers in Indonesia, employers must follow the laws in force in our country. In formal juridical use of foreign workers it has been regulated in Law no. 13. In Article 42 paragraph (1) of the UUK stating that: every employer employing foreign workers shall have written permission from the Minister, which means that *UUK* has prohibited employers from employing foreigners without written permission from the Minister.

The Understanding of *TKA* also narrows the foreign citizens visa holders with the intention of working in the territory of Indonesia. Meanwhile, foreign workers who can be employed in Indonesia are only in working relationships for certain positions and certain times only. To provide wider opportunities for Indonesian labor migrants, the government limits the use of foreign workers and simultaneously exercises oversight. Therefore, the government has issued a number of legal instruments ranging from licensing, health protection coverage to the supervision. A number of regulations ordered by *UUK* include:

- (1) Ministerial Decree on Specific Occasions and Certain Time (Article 42 paragraph (5));
- (2) Ministerial Decree on Procedures for Ratification of Foreign Workers' Use Plan (Article 43 paragraph (4));
- (3) Ministerial Decree on Position and Standard of Competence (Article 44 paragraph (2));
- (4) Ministerial Decree on Certain Occupations Prohibited in Persistence by Foreign Workers (Article 46 paragraph (2));
- (5) Ministerial Decree on Certain Positions in Education Institutions Released from Payment of Compensation (Article 47 paragraph (3));
- (6) Government Regulation on the Amount of Compensation and Its Use (Article 47 paragraph (4));

- (7) Presidential Decree on the Use of Foreign Workers and the Implementation of Education and Training of Co-workers (Article 49).

2.1 Foreign Workers Use Plan (RPTKA)

On March 26, 2018 President Joko Widodo signed the Presidential Decree (Perpres) RI No. 20 Year 2018 on the Use of Labor. This Presidential Regulation was made as the implementer of Article 49 of the Law as a substitute for Presidential Regulation no. 72 Year 2014 on the Use of Foreign Workers and Implementation of Education and Training of Companion Workers made at the time of President Susilo Bambang Yudhoyono (SBY) which is considered to be no longer relevant to the current state of our nation. This Presidential Regulation has been arranged to provide work to foreign workers:

- a) government agencies, representatives of foreign countries, international bodies, and international organizations;
- b) foreign trade representative offices, representative offices of foreign companies, and foreign news agencies conducting activities in Indonesia;
- c) foreign private companies working in Indonesia;
- d) a legal entity established under Indonesian law in the form of a Limited Liability Company or Foundation, or a foreign business entity registered with the competent authority;
- e) social, religious, educational and cultural institutions;
- f) Impresario service business; and
- g) Business entities as long as they are not prohibited by law.

The Presidential Regulation also regulates that each employer must prioritize the use of *TKI* in all types of positions available. The use of new foreign workers can be done when the position cannot be occupied by *TKI*. This *Perpres* expressly states that foreign workers are prohibited to occupy positions that take care of personnel and / or certain positions.

Each foreign worker employer must have a Foreign Employment Use Plan (RPTKA) endorsed by the Minister or appointed official prior to employing the *TKA*. RPTKA is a preliminary document to be prepared by the employer that contains the plan for the use of foreign workers. This RPTKA must be submitted in writing to the Minister or appointed official. This RPTKA is used as the basis for obtaining IMTA (Permit to Employ

Foreign Personnel). The obligation to make RPTKA for employers who will employ foreign workers is excluded exclusively for employers in the form of government agencies, representatives of foreign countries and international agencies employing *TKA* (Agusmidah, 2010, p. 113).

Employers of foreign workers are also not required to have RPTKA to employ *TKA*:

1. shareholders who are members of the Board of Directors or members of the Board of Commissioners to the employers of foreign workers;
2. diplomatic and consular officers at representative offices of foreign countries; or
3. *TKA* on the type of work required by the government.

If the Presidential Regulation no. 72 Year 2014 is still regulated on the term of RPTKA no later than 5 (five) years it can be extended for the same period with due regard to domestic labor market conditions. This is not so with Presidential Regulation no. 20 of 2018 as in this *perpres* there is no longer regulation regarding the duration of the use of foreign Workers, but RPTKA valid is in accordance with the period of plan of foreign worker used by the employer. This means that the employer is decisive for how long he will use the foreign worker.

This RPTKA contains at least the following:

1. reasons for the use of foreign workers;
2. position and / or position of Foreign Workers in the organizational structure of the company concerned;
3. duration of use of foreign workers; and
4. appointment of Indonesian workers as escort of foreign workers employed.

Armed with RPTKA, each foreign worker must have an IMTA issued by the Minister or appointed official. The obligation to have IMTA does not apply to representatives of foreign countries who use foreign workers as diplomatic and consular employees. IMTA is granted for a maximum period of 1 (one) year and can be extended for a maximum of 1 year with a condition not exceeding the period of validity of RPTKA. Especially for the positions of commissioners and directors, the extension of IMTA shall be granted for a maximum of 2 (two) years with a condition not exceeding the period of validity of RPTKA.

The Presidential Regulation also requires each employer to appoint *TKIs* as counterpart workers and carry out education and training for *TKI* in accordance with occupation qualifications occupied

by TKA and facilitate the education and training of Indonesian language to the TKA. However, this provision does not apply to the positions of directors and/or commissioners. Education and training for labor migrants who become co-workers can be implemented inside or outside the country. Employers shall report the use of TKA every 1 (one) year to the Minister of Manpower covering the implementation of the use of foreign workers and the implementation of education and training of companion workers.

2.2 RPTKA Ratification Procedures

If the employer plans to hire foreign workers, the initial procedure to be performed is to have RPTKA approved by the Minister or appointed official. The procedure for the use of foreign workers has been regulated in the Regulation of the Minister of Manpower (Permenaker) RI Number 16 of 2015 as already amended by the Minister of Manpower No. 35 of 2015 on the Procedures of the Use of Foreign Workers. In order to obtain RPTKA the foreign worker employer must submit an online application to the Director General of Ministry of Home Affairs through the Director by fulfilling the following requirements:

- a. reasons for the use of foreign workers;
- b. completed RPTKA forms;
- c. business license from the authorized institution;
- d. deed and approval of the establishment and/or amendment of the competent authority;
- e. organizational structure chart of the company;
- f. recommendation of positions to be occupied by foreign workers from technical institutions in accordance with regulations applicable in the relevant technical institutions;
- g. information of company domicile from local government;
- h. the taxpayer's principal number (NPWP) of the employer;
- i. letter of appointment of companion workers and assistance program plan;
- j. a letter of statement to carry out education and job training for TKI in accordance with occupation qualifications occupied by TKA; and
- k. evidence of compulsory employment report according to Law no. 7 of 1981.

If the result of the RPTKA eligibility assessment meets the requirements, within 2 (two) days of receipt of the application, the Director General or

Director shall issue the RPTKA approval decision. RPTKA whose work location across provinces can be used as a basis for extension of IMTA by province or regency / municipality in accordance with their authority. The issuance of the RPTKA decision is made by the Director General for the employment of foreign workers employing TKA of 50 persons or more and the Director for an employer of foreign workers employing TKA is less than 50 persons.

3 TYPES OF CERTAIN TIME PERFORMANCE IN RPTKA

3.1 RPTKA for Emergency and Urgent Work

Emergency and urgent work is work that requires immediate treatment, and if not dealt with directly may result in fatal losses to the company and / or the general public. As for the type of work that is Emergency and Urgent includes natural disasters, *force majeure*, damage to machinery or production equipment. In order to obtain RPTKA for emergency and urgent work, foreign worker employers must submit the requirements as defined in Permenaker No. 16 of 2015, including but not limited to: a) the reasons for the use of foreign workers; b) a completed RPTKA form; c) business license from the authorized institution; d) a letter of emergency and urgent statement from the employer of TKA.

The application for ratification of RPTKA shall be no later than 2 (two) working days after the expatriate worker. If the results of the RPTKA feasibility assessment for emergency and urgent work meet the requirements, the Director General or Director shall issue a RPTKA approval decision within 1 (one) working day. The validity period is only 1 (one) month and cannot be renewed.

3.2 RPTKA for Temporary Work

Temporary work is work that is at any time or can be completed in a short time. The RPTKA for temporary employment is provided for:

- a. commercial film making and has received permission from the authorized institution;
- b. conducting audits, quality control of production, or inspection on branch companies in Indonesia for a period of more than 1 (one) year;

- c. work related to the installation of machinery, electrical, after sales services, or products during the business assessment.

To obtain RPTKA for temporary employment the employer must submit a request to the Director General or Director of the Ministry of Manpower of the Republic of Indonesia. If the result of the RPTKA feasibility assessment for the work is temporary, it has fulfilled the requirements, then the Director General or Director shall issue a RPTKA approval decision within 2 (two) days of receipt of the application. The validity period is a maximum of 6 (six) months.

3.3 RPTKA for Special Economic Zones and Free Trade Zones and Free Ports

Special Economic Zone (SEZ) is a territory within the territory of the Republic of Indonesia which is established to carry out special economic functions and obtain certain facilities. Meanwhile, Free Trade Zone and Free Port (KPBPB) is an area within the jurisdiction of the Republic of Indonesia which is separate from customs area so that it is free from imposition of import duty, value added tax, sales tax on luxury goods and excise duty.

In order to obtain RPTKA in KEK and KPBPB, the employer must apply to the appointed officials of KEK and KPBPB. If the results of the RPTKA eligibility assessment in KEK and KPBPB meet the requirements, the appointed official must issue the RPTKA approval decision within 2 (two) working days. The period of 2 (two) days is referring to the provisions of Article 8 of Perpres. 20 of 2018.

3.4 RPTKA for the Territorial Waters

In order to obtain RPTKA in the territorial waters, the foreign worker employers must submit an application online to the Director General or the Director of the Ministry of Manpower of the Republic of Indonesia by evoking the requirements that have been determined. If the result of the RPTKA feasibility assessment for the water area has fulfilled the requirements, the Director General or Director must issue the RPTKA approval decision within a period of 2 (two) working days. The period of 2 (two) days is referring to the provisions of Article 8 of Perpres. 20 of 2018.

3.5 RPTA for Impresario Service Business

ImpresarioService Business is an activity to manage entertainment in Indonesia, either bringing in or repatriating TKA in art and sport which is temporary. In order to obtain RPTKA for impresario service business, the foreign worker employer must apply to the Director General or Director of Ministry of Manpower RI by completing the specified requirements.

If the result of the RPTKA feasibility assessment for the impresario service business has fulfilled the requirements, then the Director General or Director shall issue a RPTKA approval decision within a period of no more than 2 (two) working days.

3.6 RPTKA for Singing/Karaoke Guides

To obtain RPTKA for singing / karaoke guides, the foreign worker employers must apply by completing the specified requirements. If the result of the RPTKA feasibility assessment for the singing / karaoke guides has met the requirements, then the Director General or Director of Ministry of Home Affairs shall issue a decision on ratification of RPTKA within 2 (two) working days. The validity period is a maximum of 6 (six) months and cannot be extended.

4 TKA REQUIREMENTS

Foreign nationals who want to work in Indonesia cannot just casually work in Indonesia as TKA must meet the following requirements:

- a. having an education in accordance with the terms of occupation to be occupied by foreign workers;
- b. having a certificate of competence or having work experience in accordance with the position to be occupied by TKA for at least 5 (five) years;
- c. making a letter of revelation to transfer its expertise to TKI assistant as evidenced by the report on the implementation of education and training;
- d. having NPWP for foreign workers who have worked for more than 6 (six) months;
- e. having a proof of insurance policy on an Indonesian legal entity; and

- f. National Social Security membership for foreign workers who work more than 6 (six) months.

5 PROCEDURES FOR OUTSTANDING IMTA

After the proposed RPTKA is approved by the Minister or appointed official, the employer may proceed directly to the application of IMTA, as a basis for the issuance of working visa and residence permit card (KITAS) for the foreign worker concerned. Every employer of foreign workers shall have IMTA issued by the Director. Foreign workers holding positions of members of the Board of Directors, members of the Board of Commissioners, or members of the Board of Trustees, members of the board, members of supervisors who are domiciled abroad are not required to have IMTA. The obligation to have IMTA also does not apply to representatives of foreign countries who use TKA as diplomatic and consular employees.

To obtain IMTA the employer of foreign workers must apply online to the Director by fulfilling the following requirements:

- a. proof of payment of DKP-TKA through a government bank appointed by the Minister;
- b. the ratification decision of RPTKA;
- c. passport of TKA to be employed;
- d. fitting photo of TKA color 4 x 6 cm;
- e. letter of appointment of migrant workers;
- f. having an education in accordance with the terms of occupation to be occupied by foreign workers;
- g. having a certificate of competence or having work experience in accordance with the position to be occupied for at least 5 (five) years;
- h. draft work agreement or employment agreement;
- i. proof of insurance policy in insurance company with Indonesian legal entity; and
- j. a recommendation from an authorized inconsistency where necessary for a foreign worker to be employed by an employer of TKA.

6 JURIDICAL IMPLICATIONS

Based on the descriptions mentioned above, it is understood that if any foreign workers entering

Indonesia do not follow applicable legal procedures, they may be qualified as illegal foreign workers. The legal consequences for illegal foreign workers not only affect the foreign workers themselves, but also have legal implications for employers. UUK has affirmed criminal sanctions to the employer as regulated in Articles 185 and 187 of the UUK as well as administrative sanctions in accordance with the provisions of Article 190 of the UUK.

Penalty imprisonment for a minimum of 1 (one) year and a maximum of 4 (four) years and/ or a fine of at least Rp. 100.000.000, - (one hundred million rupiahs) and at most Rp. 400,000,000, - (four hundred million rupiahs) for an employer employing a foreign worker without written permission from the Minister of Manpower or a designated official. In addition, for employers of foreign workers who do not comply with the provisions concerning the position and standard of competence, do not provide a companion worker and do not carry out education and job training for TKI can also be given sanctions of imprisonment of at least 1 (one) month and no later than 12 (twelve) years and/or a minimum fine of Rp. 10.000.000, - (ten million rupiahs) and at most Rp. 100.000.000, - (one hundred million rupiahs).

For an employer who does not provide a companion worker and does not carry out education and job training for TKI, other than to be subject to criminal sanctions can also be given administrative sanctions as stated in Article 190 UUK namely in the form of: a) reprimands; b) written warning; c) restrictions on business activities; d) freezing of business activities; e) cancellation of consent; f) registration cancellation; g) temporary suspension of parts or all of the means of production; h) revocation of permits.

7 SOCIOLOGIC IMPLICATIONS

The presence of foreign workers in the national economy of a country will be able to create competencies that lead to efficiency and improve economic competitiveness. Philosophically and in the spirit of globalization, the use of foreign workers in developing countries is intended for transfer of knowledge and transfer of technology.

Open access to foreign workers can be used as a study material in selecting sectors or sub-sectors that want to be liberalized. The need for high skilled worker (TKA) is increasing in line with economic progress in a country (Yanti, 2016, p. 6). The presence of foreign workers in the national economy

of a country is sociologically intended to create competencies which in turn will create efficiency and enhance economic competitiveness. But often in the implementation of many problems, especially related to the expertise when dealing with migrant workers.

Although liberalization undertaken within the framework of the WTO is intended to regulate free movement of personal, it is still associated with the ownership of the company, meaning that if a foreign party is allowed to buy or establish a company, the foreign party is also allowed to bring or employ experts company. The next question that will arise is how the migrant workers because foreign companies in the host country are obliged to hire Indonesian labor migrants. Therefore, a clear and definite legal regulation is needed so that foreign companies in Indonesia can comply. The existence of national legislation should also consider the effects of globalization (Ibid).

There is no other way our labor should be ready to compete in the midst of global markets. Increased competence becomes the absolute thing to be able to win the job market competition. Now the job market is no longer protected by the rules of legislation, but is determined by the ability or skill of each individual. Workers who rely solely on government protection will be eroded by the times; while the labor used is the workforce rely on expertise and competence according to their respective fields. Manpower today is a workforce that is able to compete in the modern job market based on its competencies.

REFERENCES

- Agusmidah. 2010. *Hukum Ketenagakerjaan Indonesia Dinamika dan Kajian Teori*. Bogor: Ghalia Indonesia.
- Agusmidah. 2011. *Dilematika Hukum Ketenagakerjaan Tinjauan Politik Hukum*. Medan: Sofmedia.
- Anoraga, P. 1995. *Perusahaan Multinasional dan Penanaman Modal Asing*. Jakarta: Pustaka Jaya.
- Budiarti, Y. 2016. *Perizinan Penggunaan Tenaga Kerja Asing Dengan Berlakunya Masyarakat Ekonomi Asean*. Tesis. Program Studi Magister Ilmu Hukum Fakultas Hukum Universitas Lampung.
http://digilib.unila.ac.id/24490/3/TEISIS_TANPA_BAB_PEMBAHASAN.pdf
- Naning, R. 1983. *Perangkat Hukum Hubungan Perburuhan (Industrial) Pancasila*, Jakarta: Ghalia Indonesia.
- Peraturan Presiden Republik Indonesia Nomor 20 Tahun 2018 *Penggunaan Tenaga Kerja Asing*. 26 Maret 2018. Lembaran Negara Republik Indonesia Tahun 2018 Nomor 39. Jakarta.
- Peraturan Presiden Republik Indonesia Nomor 72 Tahun 2014 *Penggunaan Tenaga Kerja Asing Serta Pelaksanaan Pendidikan dan Pelatihan Tenaga Kerja Pemping*. 10 Juli 2014. Lembaran Negara Republik Indonesia Tahun 2014 Nomor 162. Jakarta.
- Peraturan Menteri Ketenagakerjaan Republik Indonesia Nomor 35 Tahun 2015 *Perubahan Atas Peraturan Menteri Ketenagakerjaan Nomor 16 Tahun 2015 tentang Tata Cara Penggunaan Tenaga Kerja Asing*. 23 Oktober 2015. Berita Negara Republik Indonesia Tahun 2015 Nomor 1599. Jakarta.
- Peraturan Menteri Ketenagakerjaan Republik Indonesia Nomor 16 Tahun 2015 *Tata Cara Penggunaan Tenaga Kerja Asing*. 29 Juni 2015. Berita Negara Republik Indonesia Tahun 2015 Nomor 964. Jakarta. Randang, F.B. 2011. *Kesiapan Tenaga Kerja Indonesia Dalam Menghadapi Persaingan Dengan Tenaga Kerja Asing*. *Servanda Jurna Ilmiah Hukum*, 5(1).
- Sumarprahatiningrum, C. 2006. *Penggunaan Tenaga Kerja Asing di Indonesia*. Jakarta: HPSDMI.
- Syarif, H.S. 1996. *Pedoman Penggunaan Tenaga Kerja Asing di Indonesia dan Peraturan-Peraturannya*. Jakarta: Sinar Grafika.
- Undang-Undang Republik Indonesia Nomor 13 Tahun 2003 *Ketenagakerjaan*. 25 Maret 2003. Lembaran Negara Republik Indonesia Tahun 2003 Nomor 39. Jakarta.