

LEGAL STATUS OF THE MYANMAR MIGRANT WORKERS IN THAILAND: THE EXPERIENCE OF WORKERS FROM MON AND KAREN STATES IN THAILAND

Dr Mi Khin Saw Aung

Head of Law Department, Dagon University, Myanmar

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ABSTRACT

Myanmar's unfavorable business environment leads to difficulties for its citizens, especially in rural regions, to find a job with a stable income. To fulfill basic needs for their families, many people from Myanmar cross the border to find a job in the rapidly modernizing neighboring country of Thailand where the salary for unskilled laborers is higher than that of white-collar workers in Myanmar. Thailand hosts the largest number of Myanmar migrant workers. Because of the unfamiliarity of the migration process and, the time and efforts it takes, most of them enter into Thailand illegally and work without proper documents. Even those who cross the border and work legally sometimes end up as illegal workers due to various circumstances, including because they are not able to move between jobs without the employer's consent. As a result, a large percentage of these workers in Thailand cannot enjoy most of the rights provided for under Thai Laws and under International Human Rights Law. The purpose of this research is to identify ways for the Myanmar migrant workers in Thailand to be able to fully enjoy the rights to which they are entitled. By first providing a thorough review of the existing laws and regulations relating to migrant workers domestically and internationally and then analyzing the current situation of Myanmar migrant workers in Thailand through interviews, this study aims to explore what can be done by the Myanmar government to reduce and eventually eliminate irregular migration to Thailand and to ensure that those working in the country are in a regular situation. The study also points out the importance of informing migrants about the existing process to migrate regularly to Thailand.

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Introduction

Myanmar's underdeveloped and slowly growing economy leads to difficulties for its citizens, especially in rural regions, to find a job with a stable income. In this context, many are left with no choice but to move across the border to Thailand where the basic salary for unskilled physical laborers is higher than that of most white-collar workers in their home country. According to Myanmar's 2014 nation-wide census, 70 percent of the 2 million Myanmar people working abroad are in Thailand. Many are performing what we call the "3D jobs" (dirty,

dangerous, difficult) in order to earn enough money to send to their families in Myanmar. Moreover, while the Thai economy benefits significantly from this workforce, almost every Myanmar worker who migrates to Thailand is living under a constant threat of being arrested, detained and deported due to their lack of legal status in the country. In 2018, over 70,000 Myanmar migrant workers were deported for being undocumented (Khin Myat Myat Wai, 2020).

The main problem lies in the legal status of these migrant workers in Thailand. Due mostly to

the costs and the time-consuming process of gaining legal permission to work abroad, most of them are working in Thailand irregularly and as such they remain in a precarious situation. The lack of knowledge of the migration policies and laws in Myanmar and in the host country also makes the lives of migrant workers more uncertain. Even those people who cross the border legally sometimes fail to register as temporary workers due to their lack of knowledge regarding the migration process.

Against this backdrop, the central purpose behind this study is to inform and provide recommendations to the Government of Myanmar on measures to be taken in order to reduce irregular migration to Thailand, including cooperating with Thailand to regularize migrant workers or facilitate regular migration. It will call on the government to ratify the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families, to implement the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers; and to enact laws and regulations accordingly. In addition, the study will emphasize the need to educate migrants about the laws and regulations governing migration in Myanmar.

The research will be guided by the following questions: (i) what is the current legal status of Myanmar migrant workers under Thai law?; (ii) how can the Myanmar Government facilitate the process of legal migration to the advantage of its citizens?; (iii) How acceding the international and regional agreements on labor migration can be beneficial to the working conditions in real life?; and (iv) in what ways can the governments inform and educate the people of migrating legally and how it can be beneficial for them?.

Methodology

Data for this study was collected by using qualitative approach, including:

- In-depth surveys and interviews with returned migrant workers from Thailand in Mon and Karen States.
- Review on scholarly articles and books by experts in the relevant fields.
- A thorough study of the human rights conventions and a review of existing domestic laws.

Interviews and surveys with migrant workers can reveal their previous experiences with the

migration process to Thailand, and of working under Thai employers as either documented or undocumented workers. Interviews with Labor Ministry officials from Myanmar provide the research with necessary information on how the government deals with the migration process. Examining the existing literature on the migration of Myanmar migrant workers to Thailand provides additional accounts of migrant workers as well as the opinions and analysis of scholars from various fields in this topic. In addition, the extensive study of domestic and international legal framework allows us to identify gaps and to provide practical and specific recommendations to fill those gaps.

Criteria for selection of interviewees: Interviews have been conducted on a total of 13 migrant workers returning from Thailand (9 from Mon State; 4 from Karen State), including 6 males and 7 females. The interviewees were carefully selected to represent the four most popular job sectors for Myanmar migrant workers in Thailand (factory, construction, seafood industry, agriculture). In addition, an interview with a representative of Department of Labor, Migrant Workers Division, was conducted in Nay Pyi Taw.

Status and Rights of Migrant Workers According to International and Regional Law

According to the International Organization for Migration (IOM, 2020), there were around 272 million international migrants worldwide in 2019, out of a global population of 7.7 billion. This represents around 3.5% of the world population. Two third of the international migrants (164 million) are migrant workers.

International human rights also apply to migrants. Regarding more specifically the right to work, article 23 of the Universal Declaration of Human Rights (UDHR) states that “Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment, without any discrimination, has the right to equal pay for equal work and right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.” While the UDHR is not a binding instrument, article 6 of the International Covenant on Economic, Social and Cultural Rights provide that “right to work which includes the right of everyone to the opportunity to gain his living by

work which he freely chooses or accepts, and enjoyment of just and favorable conditions of work.” Myanmar and Thailand are members of this Covenant. The national laws of these two countries shall be enacted in line with this Covenant.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) is the most comprehensive international treaty dealing with the protection of migrant workers’ human rights. It sets standards regarding migrant workers’ access to fundamental human rights. This Convention includes provisions for the protection of the human rights of all migrant workers and their families, including documented and undocumented migrant workers.

Part III of the ICRMW provides a list of human rights that belong to all migrant workers and members of their families, irrespective of their legal status¹. Part IV of the Convention provides for additional rights specific to documented migrant workers and members of their families. Although this Convention was adopted in 1990, as of 24th of July 2020 only 55 States, especially countries of origin of migrant workers, have ratified it. Among ASEAN countries, only the Philippines and Indonesia ratified the Convention. Most receiving countries are reluctant to ratify this Convention and to implement its provisions. The ASEAN member States should ratify this Convention for the protection of human rights of migrant workers in ASEAN community. According to this Convention, documented migrant workers and their families have equality of treatment with nationals of the receiving State. States should enact national laws to protect migrant workers against exploitation.

At the regional level, the ASEAN adopted the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers in 2017. The ASEAN Consensus only covers migrant workers who are documented and those who become undocumented through no fault of their own (article 2). As sending and receiving states, both Myanmar and Thailand have a role to play in addressing irregular migration and protecting the rights of migrant workers, in line with the ASEAN consensus.

Although ASEAN Consensus is a soft law instrument, ASEAN member States are expected to adopt measures and put in place

administrative arrangements in line with the ASEAN Consensus to combat irregular migration and facilitate legal migration to the interest of both states as well as in the interest of migrants themselves (what we call a “triple win” situation). Being documented is a prerequisite for a migrant worker to be able to enjoy all the entitlement granted under international human rights law and under the ASEAN Consensus. To be able to effectively implement and enforce the relevant laws and regulations, procedures and rules guiding the respective government bodies such as ministries and directorates should be elaborated.

Process of Migration Under Domestic Laws in Myanmar and Thailand

Regarding the cooperation between States to reduce and prevent irregular migration, article 68 of the ICRMW and article 57 of the ASEAN Consensus require that states should collaborate and coordinate to prevent and eliminate illegal or clandestine movement and employment of migrant workers in an irregular situation in accordance with the national laws, regulation and policies. In addition, Article 49 of the ASEAN Consensus states that both the receiving and sending States, together with other ASEAN members, need to “collaborate to raise public awareness and disseminate accurate information on labor migration.” This means that the governments should take measures to educate and inform current and potential future migrant workers about the legal migration process, including regarding required documentation.

Article 51 of the ASEAN Consensus urges the countries to take appropriate steps to “license, regulate, and supervise public and private recruitment agencies” to eradicate “recruitment malpractices” and to “ensuring compliance with the law, regulations, and policies of the respective ASEAN member states.” This means that it is necessary for individual states to have proper laws regulating labor migration agencies and effective mechanisms to implement these laws. Among other measures, the ASEAN Consensus provides that “the Sending State will set reasonable, transparent, and standardized fees for passport issuance and other relevant documents” (article 23 (a)). “The Sending State will likewise take necessary actions to prohibit overcharging of placement or recruitment fees by any parties chargeable to migrant workers in the Sending State” (article 23 (b)). These are measures that the Government of Myanmar should implement.

Domestic Law of Myanmar

In Myanmar, the State Peace and Development Council enacted the Law relating to Overseas Employment in 1999 “to enable those seeking overseas employment to get employment opportunities and to secure such employment systematically and to ensure that there is no loss of the rights and privileges of workers and that they receive the rights they are entitled” (Section 3 (b) and (c)). In order to work as regular migrant workers abroad, migrant workers from Myanmar “need to register themselves as a worker at the Department of Labor and then as overseas employment seekers” (section 9 (a) and (c)). Before going abroad, a worker shall have obtained a certificate of registration issued by the Department of Labor.

Migrant workers from Myanmar have been crossing the border to work in Thailand without formal documents for decades. In an attempt to solve the problem, Myanmar and Thailand signed in 2003 a memorandum of understanding (MoU) on Cooperation in the Employment of Workers. The MoU focuses on formally recruiting unskilled migrant workers from Myanmar to work for a certain period in Thailand; to facilitate labor protection; and to set up measures against illegal employment. As a result, recently many migrant workers from Myanmar have been able to go and work in Thailand on the basis of the MoU. Yet, the process is not without difficulties. In particular, according to the MoU, workers who would like to work abroad have to contact an employment agency.

According to the Law relating to overseas employment (Section 25), employment agencies have to carry out duties as stated in a written agreement with the worker and communicate with the overseas employer concerned. They must ensure that the worker fully enjoys their rights and privileges. However, most Myanmar migrant workers do not know their legal rights. Some workers who have left Myanmar to work in Thailand under the MoU have been deceived by unscrupulous agents.

The Department of Labor has allowed the employment agencies to open office branches in cities and towns across states and regions of Myanmar. They have also been granted the permission to appoint sub agents. Workers from Myanmar who want to go abroad can contact agents in their respective region (Interview with Officer at Department of Labor). However,

according to the interviews with the migrant workers who have worked in Thailand, in practice it is difficult for them to access the service of such agencies in their township.

Another problem is related to the cost of the services, which represents an obstacle to regular migration. The officer of the Labor Department interviewed for the purpose of this research said that workers who are going abroad have to attend job proficiency training provided by either the government labor department, organizations, or service agents. However, most of the migrant workers have not been able to attend job training because they could not afford time and cost for it.

Domestic Law of Thailand

Under the Thai Immigration Act, “foreigners who want to stay and work in the Country must meet immigration requirements by entering with a valid travel document and by obtaining a visa. In addition, they need to have a place of residence and Health Certificate” (section 12). Those who enter without the valid documentation are considered as illegal migrants and subject to arrest, detention and deportation. With regard to labor migration from other countries, Thailand enacted the Working of Alien Act in 2008. Section 7 of Working of Alien Act provides that “the work that may be engaged by alien as well as working area and period shall be prescribed by the Ministerial Regulation. In the issuance of such Ministerial Regulation, regard shall be had to national security, occupation opportunities of Thais and demand for alien labor as necessary for the development of the country.”

Under the 2008 Alien Act, “a foreign worker shall have work permit which expires every two years. Application of work permit and renewal of permit depend on rules and procedure as prescribed by the Ministerial Regulation and limitations have to be imposed on the documented migrant workers. Alien who wishes to work in Thailand shall have work permit and place of residence in Thailand” (section 9, 10 and 21 of Working of Alien Act). According to this law, the type of work, the workplace and the ability to change employer are limited. The law also provides that foreign workers without permit might be liable to imprisonment or to a fine (section 51 and 52).

In order to have access to the rights under Thai law, migrant workers need to be documented. Myanmar as a sending state, should

take actions, in collaboration with the Thai Government, to ensure that every worker that goes abroad has the appropriate documentation. To do so, relevant government department within the Myanmar and Thai governments have to identify the causes behind the prevalence of irregular migration to Thailand, and then cooperate to ensure that people who want to migrate have access to regular migration pathways.

Current Situation of Myanmar Migrant Workers in Thailand

This section discusses the experiences of the returning Myanmar migrant workers from Thailand based on several interviews conducted with returnees. All of them went to Thailand through irregular means.

The interviews (Respondent No. 2,3,4,10 and 11) conducted for this research offer similar and sometimes identical findings as Sakaew's 2009 case study in Samut Sakorn. Sakaew S. and Tangprapakorn P. (2009, pp.19-20) stated that;

“Most migrants entering Thailand irregularly have to rely heavily on agents and brokers who find them jobs and help them obtain various documents. These migrant workers with hardly any knowledge of the labor protection law and government policies are prone to exploitation by these go-betweens. The Thai government's short-term work permits for migrants and the complicated labor registration process also widen these fields of exploitation and lead to complete manipulation of the workers in the hands of agents and dealers. The fact that the government policy does not require the workers to apply for work permits by themselves allows the agents to intervene and control the situation almost entirely. It is not unusual that the agent charges the workers two to five times the cost of work permit. Sometimes, these intermediaries may even pretend to be employers and provide jobs to migrant workers. What they really do is channeling the incomes of these workers into their pockets. Real employers also have to depend on these agents to find employers making the business of the go-between to be lucrative”.

Most workers going from Myanmar to Thailand originate from groups with the lowest income in the country. The initial cost of

migration adds up to a significant portion of their possessions and, thus, deciding to migrate is a huge venture for them. Many Myanmar workers cannot afford to migrate through regular means even though they can be sure that they will be employed in a job with a steady and favorable income. Many of the respondents decided to move irregularly to Thailand because the cost to go through the paperwork was too high and the process too long (respondent No.2 and 3). So, the labor migration process should be simplified, and it should be affordable.

In addition, returned migrant workers who acquired new skills in Thailand are competent to perform skilled work in Myanmar. They want to be sure of the availability of job opportunities in Myanmar, the adjustment of local wages and that working conditions live up to the same standards as the ones they experienced in Thailand (respondent No.4). One of the objectives of Myanmar Law relating to Overseas Employment includes enabling “the systematic utilization within the country of the knowledge experience and skills gained abroad, according to the type of overseas employment undertaken” (section 3(d)). Yet, the workers didn't have a chance to make use of the skills and experience gained abroad.

The respondent No. (5) first migrated to Thailand 18 years ago and worked at a Timber factory, first with a pink card (a stay/work permit for migrant workers in Thailand). When she was still working for the same employer, she received her PJ. In 2013, due to the insistence of the employer according to the national verification process in Thailand, the respondent returned to Myanmar, gathered National Registration Card (NRC) and Household Registration Document and applied for a passport. From then on, she worked legally in Thailand with a work permit issued by the Thai authorities, and the extension of the work permit every two years was done through a broker without any trouble.

The respondent No. (6) explained that many of his acquaintances who work in Thailand got into trouble even though they migrated officially under the MoU because of their lack of understanding of the migration procedures and of their rights in Thailand. Even people who migrated under the MoU process do not know how to lodge a complaint and seek redress if they are in troubles or if they are deceived.

The respondent No. (7) first migrated to Thailand 15 years ago and, like all others, it was

illegal. He applied for a PJ and he is currently working under a 2-year Work Permit which has regularly been extended. This means he is working regularly in Thailand but not under the MoU process. He works in the construction industry. He mentioned that he has gained considerable experience and skills over the years, working in various construction-related tasks such as laying brick and painting. He has also gained trust from his employer and is usually assigned tasks at which he is skillful but is not permitted by his work permit. From his account, it seems that the type of job a worker can take on is limited to what is assigned to him under the work permit. This means workers are not given the chance to build on their new skills and grow professionally despite the experience acquired over the years.

Moreover, some migrant workers do not want to get delayed because of the time it takes to go through the regular migration process. This is particularly common in Mon and Karen states which are very close to the border with Thailand and from where crossing the border to Thailand can be done effortlessly. This is another reason that highlight the lack of adequacy of the law (respondent No.8,10,12 and 13).

In their book titled Migration and Human Rights, De Guchteneire and Pécoud (2009, p. 4) observed that;

“irregular migrants are prone to accept extremely precarious living and working conditions that favor discrimination and exploitation. They constitute a reserve of very flexible and cheap labor, and their status makes it difficult for them to have minimum work standards respected. While this would call for increased protection, in reality they encounter even more barriers to the realization of their rights. The situation is aggravated by the implicit tolerance of governments: despite their harsh discourses on the fight against unauthorized migration, they have limited funds for combating the employment of irregular migrants through measures such as workplace control.”

The interview respondents understand that migrating according to the MoU is the only possible way to migrate and work legally in Thailand. Currently, the Thai employers are increasingly refusing to offer jobs to workers without any document, which was not the case less than 10 years ago and before.

Yet, many workers come across some challenges after officially migrating to Thailand under the MoU process, such as not receiving the wages as promised by the agency or by the broker before employment, and being sent to work in a different job compared to the one that was previously agreed with the broker or the agency. In many cases, migrant workers do not know the requirements for working abroad so they blindly follow the instructions of the agency or the broker. Many families lost their lifelong possessions and their lives by being deceived by a broker. Because brokers exist in most cases between the registered agency and the workers, once the workers start working, they lose contact with the agency. They know nothing about the agency but the name which was mentioned by their broker (respondent No.9,10 and13). This situation shows that the agencies are still not accountable.

Findings from the interviews suggest that the MoU process is actually less preferable to the migrant workers because it is harder to switch jobs or change workplace when faced with unfavorable circumstances. The necessity of employment agencies as a medium between the workers and the employers means the process is more complex than in the case of a worker contacting directly an employer. In addition, the majority of workers live far from urban centers like Yangon, where most agency offices are located, and therefore it is easier for them to migrate illegally, find employment and then gradually look out for ways to regularize their status.

To facilitate regular migration rather than irregular movements, the Department of Labor opened information counters in both departure and arrival sections of Myanmar international airports in 2014. In 2018, this task has been performed by the Department of immigration and police force of prevention of trafficking; they have been controlling the documents of migrant workers ever since. If they find that a migrant worker does not have the right documentation, the authorities will prevent him from leaving and take action against the agents. The authorities took prohibitive measures against 347 illegal agents from 2017 to the end of January 2020 based on the Law relating to Overseas Employment. To get the necessary documents, workers have to bring their labor identity cards to the township labor office. They first need to apply for PJ and contact

the agency. The Myanmar government has issued a total of 1,680,556 temporary passports between the 10th July 2009 and the 11th August 2013, and also a total of 1,099,586 certificates of identity (CI) between the 3rd of March 2017 and the 30th March 2018 for undocumented migrant workers who were already staying and working in Thailand.” (Respondent 1, Officer of Myanmar Labor Department). To facilitate regular migration, the Department of Labor should also open Information Counters along the Thai-Myanmar borders.

Conclusion and Recommendations

Irregular migrant workers do not receive the protection under the laws of the countries of destination. For instance, they cannot move freely within the country and they are vulnerable to exploitation by the employers. They are restricted from enjoying some of their basic human rights. To solve this situation, there is a need to ensure that people will migrate regularly to Thailand.

Yet, this study shows that although Myanmar and Thailand have signed the MoU on labor migration and there have been repeated amnesty measures to regularize existing irregular migrant workers in Thailand, the costs and lengthy processes required for regular migration make migrant workers resort to irregular means. In addition, this research demonstrates that migrant workers from Myanmar do not have a clear knowledge of the regular migration process to work aboard and of their rights and duties as legal migrant workers in another country.

Under the Law relating to Overseas Employment, it is mandatory for every worker to directly contact and cooperate with overseas employment agencies throughout the migration process. However, most workers skip this step. There are indeed many brokers that are more accessible than employment agencies and who connect the workers with employers in the country of destination. Yet, this situation might lead to a number of problems at the workplace, which may result in the workers wishing to move to other types of employment. However, the right to move between different employers is not granted under Thai or Myanmar law, which means that regular migrant workers may end up in an irregular situation.

Recommendations:

- Myanmar and Thailand should work together and cooperate to ensure that migrant workers from Myanmar have the opportunity to work regularly in Thailand. It is in the interest of both countries as well as in the interest of migrant workers to ensure that migration takes place through regular means.
- Migrant workers should be informed the migration process as well as their rights and duties under the laws of Myanmar and Thailand.
- Myanmar and Thailand should ratify the Human Rights Conventions such as International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the ILO Conventions relating to migrant workers. Both Countries should promulgate national laws according to International Conventions that they have ratified. In addition, since Myanmar and Thailand are members of the ASEAN, both countries should provide their national laws in line with the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers.
- The cost of migration process should be affordable for the migrant workers and there should be a government control of the work of the recruitment agencies.
- There should also be regional branches or mobile teams of agencies providing employment services in places accessible to the migrant workers. Respective township labor offices should monitor these agencies

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ⁱ This includes the right to life (Article 9) ; the right not to be subjected to torture, inhuman or degrading treatment (Article 10) the right to be free from forced labor (Article 11); the right not to be arbitrarily deprived of property (Article 15); the right to equality with nationals before the Courts (Article 18); the right not to have identity documents confiscated (Article 21); the right to equal treatment with nationals relating to remunerations, working conditions and social security (Article 25 and 27); the right to join and take part in activities of trade union (Article 26); the right to transfer earning (Article 32); the right to have access to information on their rights (Article 33). Additional rights of documented migrant workers include the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there (Article 39); the right to equal treatment with nationals with regard to access to educational institutions, vocational training, social housing and social and health services (Article 43); the right to seek alternative employment in case of the termination of a work contract prior to the expiration of the work permit (Article 51); the right to freely choose remunerated activity after five years of residence in the host country (Article 52); the right to equality of treatment with the national in respect to protection against dismissal, unemployment benefit and access to public work schemes intended to combat unemployment (Article 54).