



Thailand:

Legal Developments

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Highlights of the New Alien Business Act

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On October 20, 1999, the final legislative step for enacting a new Alien Business Act took place when the House of Representatives gave its final endorsement to the new law, which will replace the old Alien Business Law (officially entitled Announcement of the National Revolutionary Council No. 281 ("NEC 281") dated November 24, 1972).

The Alien Business Act (hereinafter called "the Act") will come into effect 90 days after publication in the *Government Gazette*. As of this writing, the Act has not yet been published in the *Government Gazette*.

NEC 281 was the most important law governing foreign direct investment in businesses in Thailand, and the Act will now be the most important law in this regard.

Highlights of the Act

□ Definition of Alien

"Alien" is defined in Section 4. The definition is the same in substance as the definition of alien under NEC 281; therefore, the concept of what is an alien and what is an alien business remains unchanged.

□ Categories of Restricted Businesses

The Act has revised the categories of restricted businesses into three schedules.

Schedule 1 covers businesses that aliens are not allowed to do for special reasons. There are 9 types of activities. This schedule will not affect any existing alien business.

Schedule 2 covers businesses related to national security or having impact on art, custom, folk handicrafts, or natural resources and environment. There are 13 types of activities. This schedule will not affect any existing alien business. Aliens who would seek to do a business covered by Schedule 2 should note that to perform a business covered by Schedule 2, they should apply with the Minister or the Director-General according to the rules and procedures stipulated by the Ministerial Regulation. The Cabinet shall complete due consideration and after it has given approval, a permit shall be issued within 15 days after the approval or permission has been granted. The Minister may attach to it such conditions as imposed by the Cabinet or stipulated by the Ministerial Regulation issued under Section 18 of the Act. (*See Section 17 of the Act.*)

Schedule 3 covers businesses that Thais are not prepared to do in competition with aliens. There are 23

types of activities. Aliens who would seek to do a business covered by Schedule 3 should note that they, too, should apply for permission in accordance with the above-mentioned Section 17. After the Director-General has given permission, the Minister or Director-General shall issue a permit within 15 days after the approval or permission has been granted. The Director-General may attach to it such conditions as imposed by the Ministerial Regulation issued under Section 18.

The list of restricted businesses set out in the above-mentioned schedules will be reviewed at least once a year. In theory, this will give the potential for further opening of some sectors to foreign participation. (See Section 9.)

❑ Opening of Some Sectors to Alien Business (i.e., Majority Foreign Participation)

There were 63 different types of businesses specified in the Annexes to NEC 281. Under NEC 281, certain of these 63 businesses were closed to majority foreign participation. In certain of these 63 businesses, majority foreign participation was possible only with the permission of the Thai government. Such permission was not easy to obtain and was subject to burdensome conditions.

The Act has eliminated 21 businesses (the "eliminated businesses") from the list of businesses in which foreign majority participation was restricted under NEC 281.

Under the Act, aliens will, in many cases, be as free as Thais to participate in these eliminated businesses unless there is a specific law governing alien shareholdings, partnerships or investments, permitting or disallowing aliens to engage in certain business operations, or regulating alien business operations. (See Section 13 of the Act.)

The said 21 eliminated businesses include 16 businesses to which no restrictions to alien participation will apply, and also include 5 businesses to which restrictions may apply under a Ministerial Regulation which has not yet been issued. Those eliminated businesses to which restrictions may apply under said Ministerial Regulation are listed under Schedule 3(2) as "other services, except those stipulated by the Ministerial Regulation."

There are 5 eliminated businesses, some or all of which may nevertheless be covered under Schedule 3

(2) if stipulated by the above-mentioned Ministerial Regulation. Those 5 businesses are the following:

- (1) Haircutting, hairdressing and beauty treatment.
- (2) Cold storage.
- (3) Printing.
- (4) Laundry.
- (5) Tailoring and dressmaking.

The 16 eliminated businesses to which no restrictions apply are:

- (1) Gardening.
- (2) Livestock farming (but this does not apply to silk worms; restrictions on alien participation in silk worm business remain).
- (3) Manufacture of drugs.
- (4) Manufacture of matches of any kind.
- (5) Manufacture of cement and cement by-products.
- (6) Manufacture of products from silk, silk threads, or silk cocoons.
- (7) Trade in ores.
- (8) Business under the law governing service-providing establishments.
- (9) Photography and photographic developing and printing.
- (10) Export of products of any kind.
- (11) Retailing of machines, machine tools and tools.
- (12) Manufacture of animal feed.
- (13) Extraction of vegetable oil.
- (14) Manufacture of embroidery and knitted products including weaving, dyeing and pattern printing.
- (15) Manufacture of glass containers including light bulbs.
- (16) Manufacture of writing and printing paper.

Some sectors previously closed to alien businesses have been moved to Schedule 3 of the Act and have been partially opened to majority foreign participation and are described as follows (quoting from Schedule 3):

- "(10) Construction, exclusive of the following:*
- (a) Construction of infrastructure concerning public utilities and communications built for the public good that requires the use of special machinery, equipment, technology or skill in the construction activity, with at least Baht 500,000,000 alien minimum capital fund;*

- (b) *Construction of type specified by the Ministerial Regulation;*
- (11) *Brokerage or agency, exclusive of the following:*
 - (a) *Brokerage or agency in securities trading or in futures contracts concerning agricultural commodities, financial instruments or securities;*
 - (b) *Brokerage or agency in trading or procuring goods and services necessary for production activity or services provided by an enterprise being of the same group;*
 - (c) *Brokerage or agency in trading, purchasing or distribution or marketing, locally and abroad, for the sale of local imported goods in such a way as to constitute an international business operation, with at least Baht 100,000,000 alien minimum capital fund;*
 - (d) *Brokerage or agency of the nature stipulated by the Ministerial Regulation;*
- (12) *Auctioning, exclusive of the following:*
 - (a) *Auction made in the nature of an international bidding, and not bidding for antiques, ancient objects or art objects that are Thai art works, handicrafts or antiquities, or that have a Thai historical value;*
 - (b) *Auction of the nature stipulated by the Ministerial Regulation;*
- (13) *Internal trade concerning local agricultural products or produce not yet restricted by special law;*
- (14) *Retail of goods of any description, with less than Baht 100,000,000 minimum capital fund in total, or with less than Baht 20,000,000 minimum capital fund for each shop;*
- (15) *Wholesale of goods of any description, with less than Baht 100,000,000 minimum capital fund for each shop;*
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- (21) *Other services, except those stipulated by the Ministerial Regulation.* (emphasis ours)

That the Ministerial Regulation mentioned above can remove a service from Schedule 3 suggests that there may be a further liberalization in the services sector.

Grandfathering of Existing Businesses

Aliens who have already performed such businesses as set out in the Schedules must notify and seek a certificate from the Director-General of the Commercial Registration Department within one year after the Act comes into force. (See Section 45 and Section 11.)

Section 9 will require such notification and certificate in the future when revisions or alterations are made in the Schedules.

Generally speaking, the Act does not affect Board of Investment promotion or businesses for export under the law on the Industrial Estate Authority of Thailand. In other words, it would still be possible for an alien business to apply for investment promotion under the law on investment promotion or to apply for permission to do business under the law on the Industrial Estate Authority; and, for businesses qualifying under such laws, those laws, the regulations issued thereunder, and the governmental agencies administering said laws would determine the conditions which would apply to such businesses, such as number of Thai shareholders, percentage of Thai ownership, amount of investment, permitted activities, etc. However, if the category of the business is one stipulated in Schedule 2 or 3 attached to the Act, the business shall request a certificate "in accordance with the procedures stipulated by the Director-General" according to Section 12.

Section 44 applies to aliens who have alien permits under the old law. They will be allowed to continue their "permitted business" according to the license/permit conditions and throughout the allowed license/permit term. The Act does not require such aliens to seek a certificate as under Section 45 or Section 12.

Equal/National Treatment, Reciprocal Rights under Treaties

The Act will not apply where a treaty between Thailand and a foreign company supersedes the Act, i.e., requires equal national treatment with respect to the businesses covered thereunder. (See Section 10.)

At the present time, the only treaty fitting the above description is the Treaty of Amity and Economic Relations between the United States and Thailand.

Protection for Americans under the said Treaty will continue under the Act the same as it existed under NEC 281..

However, an "alien" under Section 10 must "seek a certificate according to the rules and procedures stipulated by the Ministerial Regulation".

❑ All New Alien Businesses Will Be Covered

It is important to understand that the Act applies to all new alien business that will be started up after the Act is in effect. In other words, the Act applies to the businesses described in the Schedules as well as all other alien businesses. This is a significant change from NEC 281. NEC 281 applied only to the businesses listed in the Annexes attached thereto. The significance of this change from NEC 281 is that now the government can fix minimum capital requirements for any alien business--not only the alien businesses listed in the Schedules.

❑ Minimum Capital Requirements

"Section 14. The amount of minimum capital to be used by an alien for the start-up of business operation in Thailand shall be no less than that fixed by the Ministerial Regulation which however shall be no less than Baht two million" (emphasis supplied)

The next paragraph of Section 14 states:

"If the alien-operated business under paragraph one falls within any of the businesses that are subject to permit, as set out in the attached Schedules, the minimum capital fixed for each business by the Ministerial Regulation shall be no less than Baht 3 million"

❑ Winding Up or Moving a Business

Section 22 states:

"Section 22. When a permit holder or certificate holder winds up his business or moves his office or

place of business, he shall notify the Registrar of the fact within fifteen days after the winding up or the moving is made, the notification so made shall be in the form and procedure stipulated by the Ministerial Regulation."

❑ Penalties

The Act provides for substantial penalties for violation thereof, including large fines and imprisonment. (See Sections 34 through 42.)

❑ Conclusion and Unanswered Questions

- Aliens already engaged in business in Thailand should be aware of how the Act will affect them.
- Aliens seeking to set up a new business in Thailand will need to comply with the Act.
- All the conditions that will apply to alien business will not be known until the relevant regulations mentioned in this Article are issued. Will there be additional conditions in these regulations which are not mentioned in the text of the Act itself?
- In the past, a usual condition was transition to Thai majority ownership over a period of time. Will this continue to be a condition for some alien businesses?
- What additional businesses in the services sector, if any, will be opened to majority foreign participation by Ministerial Regulation?
- How many permits will be issued under the Act?
- Presumably more Schedule 3 permits will be issued than Schedule 2 permits.
- Will the issuance of a Schedule 2 permit be a rare event?

Thailand: Legal Developments is intended to provide general information on various topics. The contents do not constitute legal advice and should not be relied upon as such. If legal advice or other expert assistance is required, the services of competent professionals should be sought.



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