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Doing business as labour migrants' strategy to maintain legal status

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Abstract:

The article focuses on labour migrants in the Czech Republic who change the purpose of their stay from employment to doing business. After the economic crisis began, many migrants adopted this strategy in the hope that it would help them solve the problem of legal long-term residence in the Czech Republic. The author describes the underlying reasons and illustrates the current situation of the new entrepreneurs, drawing on personal experiences as well as interviews with migrants, people from business companies and public officers. Particular attention is paid to the situation in the Pardubice industrial agglomeration.

The life stories of Nguyen thanh Dong and Nguyen van Tung¹ are almost identical. They are both over forty, both have large families in Northern Vietnam and, at the beginning of the economic crisis, they both decided, based on information from friends and relatives who had worked in the Czech Republic before, that working in this country would pay well and help them provide for their families.

Nguyen thanh Dong came to the Czech Republic in 2008 with an employment visa and a permit to work in one of the assembly plants in Pardubice. The administrative procedure to obtain the Czech visa took almost six months. Furthermore, with the onset of the economic crisis, Dong became redundant at the assembly plant even before his trial period was over as the company started to have difficulty selling its products. For three months Dong helped his relatives, who ran a market stall, but this got him nowhere - he spent most of the money he had earned and was left with very little.

Tung's situation was similar. Having paid the \$7,000 required for the documents necessary to travel to the Czech Republic, he arrived in this Central European country at about the same time as Dong. After losing his initial job, he sought other job opportunities and contacted various agencies. He was unemployed for six months and survived thanks to the support of his family in Vietnam.

¹ Interview with Nguyen thanh Dong and Nguyen van Tung from 9 January 2010 (the names of the Vietnamese mentioned in this article have been changed to protect them).

Such individual experiences are examples of a broad problem. The new situation has been disastrous for people from Asia who came to the Czech Republic with the migration wave reacting to the needs of the labour market prior to the crisis. These people had large debts which they had accepted in the hope that they would easily pay them off after arrival. For most of them, returning home is not a solution, but rather, is viewed as an economic and social failure. Therefore, the best way to prevent the disaster resulting from unemployment has been, from their point of view, to use an administrative loophole and change the purpose of their stay.

Foreign nationals change the purpose of their stay of their visa for two reasons. Firstly, the employment permit is not flexible (it is issued for a particular employer and a particular job position), which entails the risk of losing legal status in case the foreigner loses the job. Secondly, some employers prefer to hire people with a business visa because it is cheaper and, in addition, employers then do not need to meet the obligations set out in the Labour Code.

Dong and Tung also used this opportunity and during their stay in the Czech Republic they obtained a trade certificate, which changed the purpose of their stay from employment to business.² However, for the majority of foreigners who have stayed in the Czech Republic for a short time and thus do not know the language nor the legislation, this administrative procedure is largely inaccessible. As a result, they accept offers from their fellow countrymen who call themselves ‘advisors’. Of course, their services are expensive and potentially suspect.

A professional saviour

One evening Phuong came to the hostel where Dong was staying. Dong knew him by sight. Nguyen Phuong, known among the Czechs as Filip, had the reputation of being an experienced adviser. Dong started talking to him and Phuong offered him a job in forestry. There had just been a devastating storm and the Forest Administration needed people to plant trees. After three months during which he slept and ate in the forest, Dong wanted his salary. Phuong shrugged: “What you earned was barely enough to cover the cost of accommodation and food.”

Tung, who was unemployed, also finally saw his ‘lucky star’ – he, too, met ‘Filip’ Phuong. Filip has lived in the Czech Republic for 25 years, he has a university degree and runs a perfectly legal and profitable business based on professional counselling services for his fellow countrymen. Thousands³ of other migrants from Vietnam, Mongolia and other countries who live in the Czech Republic⁴ have experienced similar situations as Dong and Tung.

² Changes in the purpose of stay for foreign nationals having a visa for more than 90 days are governed by Section 45 of the Act on the Residence of Foreign Nationals. See Act no. 326/1999 Sb., on the Residence of Foreign Nationals in the Czech Republic, as amended.

³ This estimate is based on the extent of the problem in the Pardubice Region, as documented indirectly by Foreign Police statistics, mentioned in the text below.

⁴ The only difference between these ethnic groups consists in the fact that the Mongolian community is considerably less settled in the Czech Republic. This was also reflected in its members’ willingness to participate in the Government’s project of assisted voluntary returns during the economic crisis: out of 2,089 migrants taking part in the project, 64% were Mongolian citizens, followed by citizens of Uzbekistan (15%) and Vietnam (14%). Ukrainian citizens, who form the largest group of third-country nationals in the Czech Republic, represented a minority in the project (3%). Source: Czech News Agency, see <http://www.ceskenoviny.cz/zpravy/dobrovolne-navraty-vyuzila-tretina-cizincu/412507&id_seznam=823>

The situation of these people is further aggravated by the fact that ‘advisors’ also act as employment intermediaries. Mr Phuong (Filip) explains: “For Vietnamese people who have stayed in the Czech Republic for a year, or even longer, it is virtually impossible to start a business. For example, people say that many Vietnamese run fruit and vegetable shops. In Pardubice a few of them tried, but the competition from fourteen supermarkets soon made them give up.” Also, the owners of nail studios, often mentioned as an example of new Vietnamese business, are in a different position. “The studios are run by people who have run other businesses before and have already earned enough money for the equipment and training.”

The new migrant entrepreneurs, who only use the applicable legal provisions to regularise their stay, have difficulty finding work. The most frequent solution is to find an ‘adviser’ – an individual who will use his or her contacts to find a job based on a contract for work done. The entrepreneurs then work in standard job positions. Such an arrangement is advantageous for their contracting partners, i.e. companies that give them work; the companies do not have to pay taxes and insurance for these workers and they pay them much less in wages than they would pay to agencies.

Dong and Tung both say that each month they send an invoice for some CZK 12,000 to their contracting partner (in fact their employer). With this amount they cover their health insurance, social security and taxes, as well as the services of their adviser/intermediary who, in their particular case, is also their landlord. After all these payments are deducted, Dong and Tung are left with some CZK 7,000 a month if they are lucky. Part of this amount is spent on basic food and another part is sent to their families in Vietnam. If they want to work, they have to accept these conditions.

Some companies are against this practice, but, paradoxically, this makes them less competitive. For example, Eunika Debská, HR manager in the Japanese company KYP Manufacturing Czech, says: “We know about this way of employing foreigners, but we consider it as an extreme practice that borders on illegality. This is not what we want to do; on the contrary, we want to fully respect the law and the State’s supervisory bodies. But it makes the situation difficult for us. While pseudo-entrepreneurs are allowed to do business with practically no time constraints and only need to have their visa renewed every two years, our foreign employees’ work permits have to be renewed every six months. This means a situation of permanent instability for our company, because our HR policy is based, to a large extent, on foreign workers, who are trained, have experience and do their work to our complete satisfaction.”⁵

Changing the purpose of one’s stay is a fact of life

Compliance of (not only) foreigners’ work activities with their trade certificates, in terms of the Trade Licensing Act, falls under the remit of the Pardubice City Hall, more precisely the Trade Licensing Supervision Department. Alena Řeřuchová, the head of the department, explains the legal situation in which changes in the purpose of stay take place: “To notify a trade, foreign individuals do not need to have a business visa – they have to submit a visa entitling them to stay for more than 90 days, or a long-term residence permit. If they lose their job and want to start a business, they can use their long-term employment visa to notify a

⁵ Comment by Eunika Debská (e-mail communication from 16 January 2010).

trade. So if we find out, during an inspection, that a foreigner has a valid employment visa and, at the same time, does business, this is not a problem. If the trade is discontinued for a period of more than six months, the entrepreneur has to notify the trade licensing office in writing.”⁶

For the purposes of this article the author attempted to determine whether changing the purpose of one’s stay was a widespread phenomenon in the Pardubice agglomeration in 2009. However, neither the Foreign Police nor the trade licensing offices collect such data, and changes in the purpose of stay are not recorded in the local trade licensing offices’ systems. This is not possible for technical reasons because the amended Trade Licensing Act stipulates that a trade may be notified to any trade licensing office.

The only – indirect – indication as to the seriousness of this issue comes from statistics provided by the Foreign Police Regional Directorate in Hradec Králové.⁷ The statistics illustrate the number of foreign nationals who obtained a temporary residence permit with the purpose of doing business in the Pardubice Region in 2007, 2008 and 2009. While the figures for 2007 and 2008 are practically identical (845 entrepreneurs in 2007 and 842 in 2008), in 2009 the number of individuals doing business increased to 1,306. This means that in 2009 the number of foreign entrepreneurs grew by 55% compared to 2008. In the Pardubice District the increase was even more dramatic: 417 foreign nationals were registered as entrepreneurs in 2007, 438 in 2008, and 785 in 2009. This represents a year-on-year increase of almost 80% between 2008 and 2009.⁸ It needs to be added that the figures are approximate and apart from changes in purpose, they also include newly issued visas. However, in 2009 only very few new visas were issued.

Inspections carried out by trade licensing offices follow an (internal) inspection plan and focus on compliance with the Trade Licensing Act. The inspectors check, in particular, whether the actual business activity complies with the authorised objects of business activity, whether the place of business is marked with the required information, and whether all data that the entrepreneur gave at the time of notification is still valid. In case of non-compliance, the extent to which the law has been violated is assessed individually, relevant facts are taken into account and the sanctions are determined based on the extent and seriousness of the offence.

None of the above-mentioned conditions are a problem for an experienced pseudo-entrepreneurs’ adviser. “They only need to find enough people who will send invoices to one another and receive payments from one another, in order to create an illusion of business,” says Jaroslav Krupka, director of the SMI agency.⁹ “Or the pseudo-entrepreneurs pretend they sell goods at the marketplace in Valy,”¹⁰ he adds.

It does not take much for the pseudo-entrepreneurs to deceive the authorities. They only need to comply formally with legal provisions, notify changes in relevant data, and make sure they extend the validity of their work and other permits in time.

⁶ Interview with Alena Řeřuchová, head of the Trade Licensing Supervision Department of the Pardubice City Hall, from 13 January 2010.

⁷ The information only applies to the Pardubice Region.

⁸ The statistics were provided by Iva Kormošová from the Foreign Police Regional Directorate in Hradec Králové.

⁹ Interview with Jaroslav Krupka, director of the SMI agency, from 13 January 2010.

¹⁰ One of the largest marketplaces in the Czech Republic, situated in Valy u Přelouče in the Pardubice District.

Of course, they have the obligation to submit a duly completed tax return. As has been said, without assistance this might prove an insurmountable problem for a foreigner who does not know the language. However, assistance is expensive and further worsens the foreigner's difficult economic situation. The foreigner is caught in a vicious circle.

The evil of labour agencies

Labour agencies have a strong position on the labour market due to the advantages they provide to employers, in particular the advantage of not having to take care of workers. Employers have to pay more to agencies than they would pay to workers directly, but the agencies take on the responsibilities set out in the Labour Code and cover the cost of workers' health insurance and social security that employers would otherwise have to pay themselves.

With approximately 2,150 labour agencies operating on the Czech labour market, the quality of services naturally varies and the poor record of some agencies has been reflected in both the generally negative perception of their activity and in efforts to impose bureaucratic restrictions on them. There is evidence that some agencies abuse foreigners' ignorance of their rights and of the Czech legal system to discriminate against them, give them work contracts in a language they do not understand, have them pay for services they did not ask for, or deduct absurd fines from their salaries. On the other hand, this is not always the case. There are agencies that respect their employees' rights and comply with applicable regulations.

Given the distribution of roles among individual players on the labour market and in the State's migration policy, the role of good labour agencies is significant. This becomes even more evident when agency workers are compared with foreign entrepreneurs.

For employers, it is even cheaper and more advantageous to hire entrepreneurs based on a contract for work done than to hire agency workers. Such entrepreneurs, however, often give up all legal protection and, together with the employer, their actions often border on illegality. Therefore, for an individual doing remunerated work it is better to become an employee, even if it means being an agency employee.

The SMI agency¹¹ is one of two Czech labour agencies that have implemented a certified quality management system (under ISO 9001). Currently it employs approximately 700 people. In the Pardubice Region, for example, the agency actively cooperates with Kiekert-CS, a company based in the town of Přelouč which gives work to a significant number of Vietnamese agency workers.

For director Krupka, the government's approach to the employment of foreign nationals is hard to understand. "In my opinion, solutions like contracts for work done are simply absurd," he says. Unlike this practice, employment of foreigners through labour agencies is easy to supervise and the government takes every opportunity to do so. "In a situation where the employment of foreigners is criticised for populist reasons, the government is adopting a strict attitude to the supervision of agencies, as if agencies were the root of all evil," adds Krupka.

¹¹ SMI – Stamont Metal International, spol. s r. o., <<http://www.smi.cz/index.php>>

Respectable agencies do not harm the foreigners they employ by making them sign contracts for work done. However, some agencies may offer such contracts to foreign trade certificate holders, in particular those which cannot afford, for example, to pay their employees for idle time if their client company does not have enough work. In Foxconn CZ, a Pardubice-based company whose production is highly dependent on rapidly changing market demand, the system of contracts for work done is used by another large agency that staffs whole sections of the company in this way.

Time to stop being humane?

To reside in the Czech Republic, foreign nationals need to comply with a number of limiting red-tape laws, regulations and decrees. HR manager Eunika Debská points out the risk that changing the purpose of one's stay involves: "If the Foreign Police issues two-year business permits, it is a strong argument that 'advisers' can use to persuade even legally employed workers. Unfortunately, as neither the 'advisers' nor the foreign workers know Czech laws, changing the purpose of their stay may get them in trouble: when employees stop working, their work permit is revoked, and they become totally dependent on their 'benefactors'," says Debská with a reference to the Employment Act.¹²

She is right: although these foreigners obtain a valid trade certificate and a residence permit, many of them are unable to find a job, and thus find themselves in stressful situations that are difficult –and sometimes impossible – to handle.

Indeed, if the law was applied strictly, it would mean that changing the purpose of stay to business would invalidate the applicant's work permit, and thus also his or her employment would be terminated. The Aliens Act stipulates that "if a foreign national fails to comply with the purpose of his/her stay, his/her residence permit may be revoked." It is probably the word 'may' in this provision that has caused the competent authorities to be lenient with foreigners in the past.

As labour agency director Krupka states, the problem might be solved by granting a kind of time-limited pardon to foreigners who want to change the purpose of their stay back to employment. However, according to Tomáš Haišman, head of the Department for Asylum and Migration Policy of the Ministry of the Interior¹³, this is unacceptable as foreigners will not be able to get a new work permit in the current economic situation. "It is harsh, and I feel sorry for these people, but they wasted their chance to return home under decent conditions when they did not take part in the assisted voluntary returns programme," he says. However, as has been mentioned before, the programme was not a solution to most labour migrants' problems. Besides, if only half of those who have faced employment problems in the past year had applied, the capacity of the voluntary returns programme would have been quite insufficient.

The Department for Asylum and Migration Policy monitors the situation and wants to act, in particular by introducing stricter supervision. This supervision should be carried out in cooperation with tax offices and with the Czech Social Security Administration, which has the power to check whether self-employed persons fulfil their obligation to pay social security

¹² Under the Employment Act a work permit expires: "Section 100 (1) The work permit shall expire... (d) should the residence permit for the purpose of employment expire for some other reason."

¹³ A statement made at a meeting of the Department with NGOs that took place on 25 January 2010 at the Ministry of the Interior.

contributions. This check will naturally make the situation of the new entrepreneurs more difficult.

The Ministry of the Interior believes that foreigners affected by the economic crisis will not be willing to accept their state of material poverty for much longer. However, is the Ministry's assessment of future development realistic? The labour migrants may start working for cooperatives – a new form of labour intermediation that exploits a loophole in Czech legislation. For the foreigners in question this change would mean even less legal protection and a total dependence on the system run by middlemen. However, it is hard to say what the foreign workers are ready to accept.

In reply to my declaration that these people would be willing to stay in a hole in the woods if they had to, Mr Haišman stated: "This is exactly what I fear."

Mr Haišman's reply suggests he is aware that the reactions of some foreigners who have fallen into extreme poverty are hard to predict. These are the people who do slave work in illegal cannabis factories. Such 'projects' are short-lived because, as a result of illegal energy consumption, the premises are often checked by energy companies and the police. However, unlawful activities are not always so easy to prevent, and people looking for a way out of their situation always end up accepting an offer that gives them at least a little hope. Therefore, we may ask: Would it not be better for the State and for society to give these people an opportunity to work legally, which would benefit both sides?

Translation: Jiřina Holcupová

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