



Foreign employment: Legal framework and its legal cases in Nepal

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Abstract

Remittance from foreign employment has been the major contribution in the Gross Domestic Product of Nepal. Every year a large number of Nepalese migrant worker is going aboard for employment. The recruiting agencies in the foreign employment sector have been playing a key role in the sector. The sector has many players in the Nepalese market, from brokers to agencies who are operating legally, if registered at government agencies as per the Foreign Employment Act, 2007. The remittance from foreign employment has been the backbone of the Nepalese economy and the Foreign Employment Act, 2007 has been the main cornerstone to deal with the legal cases related to foreign employment. The act has made the provisions to handle the legal cases by the Department of Foreign Employment at the initial phase and if not dealt from there are forwarded to the Foreign Employment Tribunal. In context to Nepal, the Foreign Employment Tribunal has been the key institution to settle the legal cases related to foreign employment as the Supreme Court of Nepal has also forwarded the decisions as it was decided from the Tribunal. Nevertheless, the cases related to foreign employment are difficult to be settled easily in context to Nepal due to the centralization of the court system, inadequate evidence produce by the victims at the court and lack of sufficient technical resources to handle the foreign employment-related cases.

Keywords: foreign employment act, foreign employment, legal cases, Nepal

Introduction

Foreign employment has been the most significant motivation for international migration from Nepal in the twenty-first century. Foreign employment has provided alternative livelihood opportunities and remittances which helped to augment household incomes.

Among the many impacts of foreign employment, in context to Nepal, the social dynamics have changed, with many people in the working-age population, particularly men, absent from home has brought social dilemma. Furthermore, cultural norms are being transformed as more women join the labor force nationally and internationally.

The voluminous nature of labor migration for employment has brought both new opportunities and challenges for the Government of Nepal. A primary concern has been in managing the huge outflow while ensuring the safety, rights, dignity, and welfare of migrant workers which ultimately required strengthening the governance process, creating adherent legislation and policies and ensuring their proper implementation.

Despite the legislation and policies and an increase in migrant workers opting to go abroad via regular channels, there are still gaps in the implementation of such legislation and policies. These gaps have hampered the rights and safety of migrants. The cases of labor migrants suffering from abuses, exploitation and financial distress are frequent and impinge on their rights and well-being ^[1].

Migration is a common phenomenon in both its domestic and international dimensions in Nepal. Traditionally, most of the migration took place within the country's borders, with some people going to India and Tibet. Nepal's entry into the global economy has since re-defined these historical trends, and, now,

Nepalese can be found spread across the globe. Labor migration to the Gulf States and Malaysia has seen significant growth over the years and now accounts for an increasingly larger share of Nepal's international migration, while immigration into Nepal continues to be mostly from India-a fact facilitated by the open border between the two countries ^[2].

Migration of people from one place to another is a usual phenomenon since the beginning of human civilization. The migration, in the beginning, was for the sake of food and exploring new places for security purpose. But gradually the migration took the outline in diverse form and now has become a very essential and common in each and every corner of the world. International Labor migration is one of the integral components to affect all the direction; it may be economic, the flow of lifestyle and sociocultural issues ^[2].

Labor migration has, in the 21st century, moved to the top of the policy agendas of many countries - countries of origin, transit, and destination. Most of the world's estimated 150 million migrants are people searching for improved economic opportunities abroad. Generally "push" of the population, unemployment, poverty eradication in origin countries and "pull" of changing demographics, complete security and working hub in many industrialized or commercialized aiming countries ^[3]. An alarmingly large proportion of Labor migration occurs illegally, governments of both sending and receiving countries are developing regulatory mechanisms to manage Labor migration. These include selective recruitment policies by countries needing Labor, overseas employment and security strategies by countries supplying labor ^[4].

Although the attraction for foreign employment is increasing every day, employment is not safe, secured and managed well.

Foreign countries are getting cheap labor whereas the Nepalese migrant worker is not getting rights and honorable works. The main reason behind this scenario is the majority workforce going from Nepal are unskilled or semi-skilled. This has compelled Nepalese worker to sell their labor at a throwaway price whereas they have to invest a lot of money.

The Foreign Employment Act, 2064 (2007) has clearly made a legal provision for sending Nepalese for foreign employment. But, this act has not been significant in handling the various issues. Various foreign employment agencies are in running without government permission and escaping from the government inspection. Brokers and even human traffickers are taking advantage of the simple and innocent people and cheating them badly especially from the rural areas of Nepal. It is a pity that even those who have gone through registered manpower agencies and also having required skill, training and knowledge are not getting better jobs and salary as promised and advertised for abroad employment. Not merely, there are many circumstances, when such labor forces have returned prematurely not having required qualifications, ability, skills, knowledge suitable for these jobs offered or even not reaching to a specified organization where the labor was promised to be recruited. This is indeed a big and serious challenge.

According to the government reports, more than one billion rupees remittances are earned every year from foreign employment. This has largely contributed to the national economy. Many factories and industries are established from such money which helps in generating local employment and revenues. However, the continuous fleeing of trained and skilled human power would adversely affect their own economic development. They should gradually bring down the number of the outgoing labor force. The country's development is own development. It is a fact that one gets due respect only when his own country is developed. Those Nepalese working in other countries as *Bahadur* and *Kanchhas* are giving their sweat and blood for the development of other countries. Whereas it is sad to say that Nepal remains always poor, underdeveloped and backward. For this, they (Nepalese) have to get appropriate training, knowledge, skills and contribute to their own economic development^[5].

A huge number of Nepalese workers go to Mumbai to better salary in the absence of fruitful local employment opportunities. Migration is nothing new to Nepal, and the total stock of Nepalese nationals working overseas (including about one million in India) in different capacities is estimated to be about half a million^[6]. The history of the formal entrance of Nepalese citizens in Overseas Service begins in 1814-1815 after the Nepal-British India war. A total of 4,650 Nepalese youngsters were recruited to the British armed forces as a British-Gurkha regiment. Migration of Nepalese people for other employment purpose begins to work in the tea estates of Darjeeling, India, and forest of Assam, India by the second half of the 19th century^[7]. The induction of young Nepal individuals into the colonial British army in the early nineteenth century appears to be the first instance of the State's involvement in formalizing labor migration through treaties between two governments. The treaty between Amar Singh Thapa and David Ochterlony in 1815, specifically, made the flow of migrants from Nepal for foreign employment official and opened doors for such engagement beyond British India to other colonial territories^[8].

2. Legal Framework for Foreign Employment in Nepal

A. Foreign Employment Act, 2007^[9]

The history of the Foreign Employment Act in Nepal begins from the enactment of the Foreign Employment Act, 1985. The act has been enacted to amend the law relating to foreign employment in order to make foreign employment business safe, managed, decent and protect the rights and interest of the labors who go for foreign employment and entrepreneurs who are involved in the promotion of the foreign employment business. The act has twelve chapters with 87 sections covering various legal aspects of foreign employment in Nepal.

Moreover, there are ample provisions in the act, the major points of which are listed out as hereunder:

- Provisions up to 5 years' imprisonment and NRS 700 thousand capital punishment to discourage one who involves in cheating and deceiving while sending workers in employment (Chapter 9).
- Establishment of Foreign Employment Department and provision to appoint labor attaché in a destination country where more than five thousand Nepalese migrant workers are currently working (Section 67 and 68).
- A person under eighteen years is strictly prohibited for foreign employment (Section 7).
- In order to ensure compensation, provision of deposit either NRS 3 million in cash or 700 thousand in cash and rest as a form of bank guarantee is a compulsion to get approval for running foreign employment business is available in the law (Section 11).
- Provision of foreign employment welfare fund (Chapter 6) and the Foreign Employment Promotion Board (amended as Foreign Employment Board) chaired by Labor and transport management minister (Chapter 8).
- Provision for compulsory advertisement incorporating some essential information (Section 16).
- Compulsory provision of getting skilled training from the government recognized agencies (Council for Technical Education and Vocational Training-CTEVT constituent or affiliated training institute) to migrate as a skilled worker (Section 30).
- Compulsory provision of imparting orientation training prior to foreign employment (Section 27).
- Prior to the departure of a worker for foreign employment, security situation of the worker at the foreign land, a contract shall be made between the employer institution or its agent and the worker and the licensee and the worker on the terms and conditions of employment, terms and conditions to be observed by both parties and remuneration to be received by the worker, after getting the worker to clearly understand such terms and conditions and provisions of remuneration (Section 25).

B. Foreign Employment Rules, 2019^[10]

The rule is expedient to amend and consolidate laws relating to foreign employment in order to make foreign employment business safe, managed and decent and protect the rights and interests of the workers who go for foreign employment and the foreign employment entrepreneurs, while promoting that business; therefore, be it enacted by the Legislature-Parliament. In exercise of the powers conferred by Section 85 of the Foreign Employment Act, 2007, the Government of Nepal has framed the

Foreign Employment Rules, 2019. It covers ten chapters and related six schedules.

Moreover, there are ample provisions in this rule, the major points of which are listed out as hereunder:

- Under Rule No. 6, the Rule No. 6 (1f) has been dropped.
- Further, under Rule No. 6, additional three rules have been added under Rule No. 6 (30, 6(4) and 6(5) related to the provisions of transfer of ownership of the manpower company (agency).
- The most important amendment is seen for Rule No. 7. The two rules have been added under Rule No. 7 where, Rule No. 7(3) and 7(4) have made the new provisions for merger of two manpower companies and managing the bank guarantees of two interested companies in the due process of merger respectively.
- For the facilitation of the merger process of the manpower companies (agencies), eight (8) different provisions have been added after amendments under Rule No. 8(a).
- Rule No. 8 (1a) has made a strict provision that the foreign employment company that fails to send at least 100 employees to foreign destinations annually for two consecutive years will not be renewed.
- Under the Chapter 7, Provisions relating to Fund of Foreign Employment Rules, Rule No. 24, has been clarified that the labor having the job agreement of three (3) years should deposit NRS. 1500 in the fund and similarly, the labor having the job agreement of more than three (3) years should deposit NRS. 2500 in the fund.
- Similarly, under Rule No. 24, the provision of the additional amount to be deposited in the fund for listing and renewal of the medical clinics approved for foreign employee check-up.
- Rule No. 26 related to the uses of the fund has been defined clearly and also specified to use in seventeen (17) purposes related to the benefits to the Nepalese labors working aboard.
- Under Chapter 8, Provisions relating to Board and Executive Directors, Rule No. 29 (d), the function of the board was to establish safe homes only for the women workers who have gone for foreign employment and operate, or cause to be operated, such homes. And the third amendment has removed the provision just for 'women' workers and covered both the genders.
- Further provisions for use and operation of foreign employment welfare fund under Rule No. 33(1b) has been made, where the fund could be used for the legal cost when the Nepalese labor working abroad face legal challenges in the court of law, and similarly, use of fund in promotional activities regarding the rights and probable casualties that the labor could face at aboard.
- The detail provisions regarding the rewarding the health check-up centers for the labors in Nepal has been defined under Rule No. 45(a).
- The detail provisions have been defined under Rule No. 46(b) related to the compensations of the expenses to the labor if he/she has to return from aboard or rejected from the employer due to the negligence of the medical reports provided by the health check-up centers for the labors in Nepal.
- The new amended has also been made under Rule No. 45 (a7) regarding the provision of security deposit of health

institutions seeking a license to issue medical certification for migrant workers.

C. Foreign Employment Tribunal Rules, 2012

The foreign employment tribunal was established in 2010. But, in an exercise of the powers conferred by Section 85 of the Foreign Employment Act, 2007, the Government of Nepal has framed the Foreign Employment Tribunal Rules, 2012 after two years only. It covers eight chapters and related three schedules. The rules have defined the power and authorize of the tribunals. It has also defined the legal procedures that should be followed while handling disputes related to foreign employment.

The Foreign Employment Tribunal was established by the Foreign Employment Act, 2007 and has jurisdiction to adjudicate on violations of the Foreign Employment Act, 2007 and Foreign Employment Rules, 2008 that are more serious, e.g. operating a foreign employment business without a license; sending workers for employment without Department of Foreign Employment permission; and concealing or tampering with relevant documents. The process for a complaint to get to the Tribunal is a lengthy bureaucratic process that is in dire need of streamlining: firstly the Department of Foreign Employment has to investigate it, then a government attorney reviews it, then it is given to the Tribunal registrar, then a prosecutor from the public prosecutor's office will be appointed to prosecute it.

The first issue is obtaining compensation notwithstanding successful prosecution against a perpetrator. This is particularly a problem where the offense is committed by a broker, which is one of the most common cases the Tribunal receives. This is because the Tribunal can only enforce an order for compensation when it is paid out of a recruitment agency's deposit, but as the unlicensed broker wouldn't have a deposit, the victim needs to go to a district court to enforce their order for compensation.

The jurisdiction of the tribunal is defined by the Foreign Employment Act, Section 64(1) as: "For originally trying and settling cases other than those punishable by the department." This includes all cases that fall within the following offenses under the Foreign Employment Act:

- A person operating a foreign employment business without a proper license;
- A person or recruitment agency using deceptive techniques for recruitment;
- Sending a person for foreign employment without Department of Foreign Employment permission;
- Engaging in fraud;
- Sending a minor for foreign employment;
- Sending a worker to an unauthorized country; and
- Concealing or tampering with relevant documents.

These types of offenses are not subject to the one-year limitation period for filing the complaint (Section 60), and all can potentially result in fines or a prison term for the individual agent or an officer of the company (Section 57).

3. Trend of Complaint Settlement related to Foreign Employment

A. Cases Handled by the Department of Foreign Employment

The Department of Foreign Employment (DoFE) was established on December 31, 2008, as a sole organization responsible for

monitoring the foreign employment under the provision of Foreign Employment Act, 2007. Thus, the provisions made under the Chapter 10 related to Investigation and Inquiry covering from Section 60 to Section 62 as well as Chapter 11 related to Trial and Settlement of Cases covering from Section 63 to Section 66

of Foreign Employment Act, 2007 give the authorities and responsibilities to handle and settle the disputes related to foreign employment. The table below shows the detail picture of foreign employment-related cases handled by the department:

Table 1: Description of the Complaints and Settlements

F/Y	No. of complaint		No. of reported complaints settled		Filed at Court		Decision by the Department of Foreign Employment	
	Ind. ^[11]	Inst. ^[12]	Ind.	Inst.	Ind.	Inst.	Ind.	Inst.
2009-10	323	332	105	125	65	12	Nil	Nil
2010-11	721	483	355	302	89	8	Nil	Nil
2011-12	1370	802	257	202	188	8	Nil	Nil
2012-13	1245	1060	202	350	164	14	Nil	39
2013-14	974	1577	151	303	128	5	Nil	45
2014-15	773	1906	74	589	165	1	Nil	2
2015-16	704	1468	94	426	222	4	Nil	14
2016-17	931	1452	159	687	265	52	Nil	Nil
2017-18	1109	1020	191	832	234	Nil	Nil	Nil
2018-19	776	1263	Nil	614	186	Nil	Nil	81

Source: Department of Foreign Employment, Ministry of Labor, Employment and Social Security, Government of Nepal

The cases related to foreign employment are mainly seen higher for institutional cases than an individual. But the cases filed in the court are seen higher for the individual cases. The decision for the case related to foreign employment has not been seen dealt with or handled by the Department of Foreign Employment since the past fiscal year. In most of the cases, the two parties settled the complaint or grievance informally, outside of the Department of Foreign Employment. Such factors as centralization of the redress mechanism and agencies, lack of adequate resources and human capacity needed for investigation and lack of evidence to support the complaints are common barriers to using the formal redress mechanism. This situation is also reflected in the number of complaints registered and the number of complaints settled, both against individuals and institutions, which again is low. The trend of cases filing in the court by individuals are seen increasing

and just inverse for the cases related to institutional is seen as all the cases are settled from the department.

B. Cases Handled by the Foreign Employment Tribunal

By the power vested by Section 85 of the Foreign Employment Act, 2007, the Government of Nepal has framed the Foreign Employment Tribunal Rules, 2012. Similarly, under Chapter 1 treated to relate to Trial and Settlement of Cases, Section 64 (1) to Section 64 (6) of the Foreign Employment Act, 2007 has elaborated the provisions of handling and settling the cases related to foreign employment by the Tribunal. The rule has given the authorities and responsibilities to handle the cases related to foreign employment by the Foreign Employment Tribunal. The table below shows the case registered, settled and remain to be settled at the tribunal:

Table 2: Cases Registered and Settlement Position

F/Y	Case Registered (New and Carried Over)	Case Settled	Cases Remaining to be Settled
2009-10	158	16	143
2010-11	262	78	184
2011-12	370	124	246
2012-13	424	163	261
2013-14	395	151	244
2014-15	419	213	206
2015-16	436	185	251
2016-17	562	204	358
2017-18	796	234	562
2018-19	982	429	553

Source: Foreign Employment Tribunal

The cases forwarded by the Department of Foreign Employment are registered at the Foreign Employment Tribunal. The Tribunal trials and settles cases other than those punishable by the Department of Foreign Employment as per the Foreign Employment Act, 2007. Particularly, the Department of Foreign Employment cannot make decisions on individual cases and must refer such cases to the Tribunal.

The data shows that the cases at the Tribunal are increasing day-

by-day as the Department of Foreign Employment is not making any decisions on the disputes. The department has been taking actions against the manpower firms who are cheating the labors and are responsible for strangling of Nepalese labors abroad. But there are huge challenges in settlement of the case related to foreign employment due to lack of the documentation to support the claim, centralization of the institutions at the capital city, and the inadequate resourcing and training to the officials.

C. Foreign Employment Cases Decisions from Supreme Court of Nepal

Majority of the cases related to foreign employment are settled under the jurisdiction of Foreign Employment Tribunal. Nevertheless, if the concerned party is not satisfied by the verdict given by the Tribunal, she/he can go to the Court within 35 days of the decision made from the Tribunal as per the provision of Chapter 11, Section 66(2) of Foreign Employment Act, 2007. Some of the cases, the verdict was given from the Supreme Court of Nepal are discussed below:

In the case of *Yadav v Shrestha* ^[13] related to foreign employment, the Supreme Court of Nepal decided that any person goes into the contract and takes a sum of money for ticketing purpose for foreign employment is against the law, until and unless, if the party was registered under the prevailing Foreign Employment Act. If the party involved in ticketing business is not registered under the prevailing Foreign Employment Act, then, h/she is not punishable as per law.

In the case of *Santabahadur v Khakural* ^[14] related to foreign employment, the Supreme Court of Nepal decided that the decision to seize the guarantee amount from the district court of Kathmandu should be implemented as the offender has not been present on all the hearings at the District Court as well as an Appellate Court.

In the case of *Saha v Government of Nepal* ^[15] related to foreign employment, the Supreme Court of Nepal decided that there is no sufficient evidence that the offender has done the fraud case and no offensive activities are seen to be convicted. Hence, the offender was not declared as a fraud offender since the third party is seen to deal in the transactions, and the so-called offender was seen unaware about the intention of the third party.

In the case of *Bohara v Adhikari* ^[17] related to foreign employment, the Supreme Court of Nepal decided that the decision made from the Foreign Employment Tribunal should be continued as it is and there is no sufficient legal stand as well as no sufficient pieces of evidence and required documents for an appeal. Hence, the punishment decided by the Tribunal should be implemented as it is.

In the case of *Giri v Giri* ^[18] related to foreign employment, the Supreme Court of Nepal decided that the decision made from the Foreign Employment Tribunal should be continued as it is and there is no sufficient legal stand for appeal. Hence, the punishment decided by the Tribunal should be implemented as it is.

In the case of *Pokheral v Tamang* ^[19] related to foreign employment, the Supreme Court of Nepal decided that due to the lack of sufficient evidence, the fraud as defined as a criminal offense could not be justified as decided by the Foreign Employment Tribunal. Hence, the decision from the Tribunal should be implemented as it is.

In most of the above cases, the Supreme Court of Nepal has forwarded the decisions made by the Foreign Employment Tribunal and ordered to implement the decision as it is. Hence, the practice from the Supreme Court shows that the action taken from the jurisdiction of the Tribunal has been appreciated by the Court.

5. Conclusion and Discussion

The trend of foreign employment among the youth of Nepal has brought both economic as well as social impact in the past

decade. Lack of better or no employment opportunities within the nation mainly due to a decade long political instability, the number of Nepalese youth going abroad for employment has increased heavily.

Nepal is one of the top nations among the developing nations in which the economy is highly dependent on the remittances from foreign employment. Nepal is among the top five nations, where a remittance covers the bulk portion (more than 50 percent) of the nation Gross Domestic Product ^[20]. In such a scenario, foreign employment can be seen as a vital part of the Nepalese economy. In the context to better manage the foreign employment sector, the government has amended the Foreign Employment Rules, 2019 decentralization of the department of labor as per the federal system, increasing the license fees, increasing the amount of bank guarantee for the manpower agency. As per the Ministry, the proposed hike in license fees will keep the agencies that cannot afford to pay the compensation or other expenses in case of fraud away from the sector. The revised Foreign Employment Rules, 2019 also intends to reduce the number of foreign employment companies by merging multiple companies operated by a single family. The amended act is aimed at making the foreign employment sector, which is marred in malpractices and cases of fraud, more managed and refined.

Furthermore, the competences of the human resources working at the Department of Foreign Employment as well as at Foreign Employment Tribunal should be enhanced. This might improve the efficiency of the institutions specialized in dealing the legal issues related to the foreign employment at grass-root level and reduce the load at the Supreme Court.

Finally, the major obstacle in the proper implementation of the acts, rules, and regulations in the foreign employment sector is that the stakeholders for whose rights, the provisions are made, they are either under-educated or just literate as well as vulnerable of human-trafficking. As the foreign employment sector is being a major contributor in the socio-economic sector of Nepal, the legal provisions should be strictly updated regarding the dynamic nature of the sector.

References

1. Ministry of Labor and Employment. Labour Migration for Employment A Status Report for Nepal: 2014/2015. Ministry of Labor and Employment, Government of Nepal, Kathmandu, 2015.
2. Sharma S, Pandey S, Pathak D, Sijapati-Basnett B. State of Migration in Nepal. Research Paper VI, Center for the Study of Labour and Mobility, Kathmandu, 2014.
3. International Labor Organization. Challenges to Labour Migration Policy and Management in Asia. International Labour Organization, Geneva, 2003.
4. Gill GJ. Seasonal Labour Migration in Rural Nepal: A Preliminary Overview. Overseas Development Institute, Working Paper 218, London, 2003.
5. Adhikari J. Migration between Nepal and India in Nepal Migration Year Book 2009, Nepal Institute of Development Studies (NIDS), 37-44, Kathmandu, 2009.
6. About Employment, <http://www.phdessay.com/about-employment/> March 14, 2017.
7. ILO-DFID. Managing Foreign Employment in Nepal: Issues, Challenges and Strategies. Unpublished Advisory Report, ILO-DFID, Kathmandu, 2002.

8. Bhattarai P. Migration of Nepalese Youth for Foreign Employment: Problems and Prospects. <https://www.tigweb.org>. May 31, 2006.
9. Sijapati B, Limbu A. Governing Labour Migration in Nepal: An Analysis of Existing Policies and Institutional Mechanisms. Himal Books for the Centre for the Study of Labour and Mobility, Kathmandu, 2012.
10. Few amendments related to the gender discriminations and gender violence was made on October 1, 2015.
11. The Foreign Employment Rules, 2018 is the third amendment of the Foreign Employment Rules, 2008. Further, fifth amendments were done on August 18, 2019.
12. Refers to Individual Case
13. Refers to Institutional Case
14. Yadav Shrestha V, Ne Ka Pa. 2003 SC 2022.
15. Santabhadur v Khakural, Ne. Ka. Pa. 2010. SC 065-CR-0229.
16. Saha v Government of Nepal, Ne. Ka. Pa. 2015. SC 065-CR-0712.
17. Bohara v Adhikari, Ne. Ka. Pa. 2015. SC 070-CR-0289.
18. Giri v Giri, Ne. Ka. Pa. 2016. SC 071-CR-0236.
19. Pokheral v Tamang, Ne. Ka. Pa. 2016. SC 068-CR-0877.
20. Nepal Rastra Bank. Current Marcoeconomic and Financial Situation-2019/20. Kathmandu, 2019.