CHALLENGES REGARDING ALIENS' RIGHT TO WORK UNDER TURKISH LAW

Yabancıların Çalışma Hakkıyla İlgili Türk Hukukunda Bulunan Kısıtlamalar

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ABSTRACT

In many countries, aliens and citizens are not deemed equal with regard to the right to work and it is a well settled law that aliens' right to work can be subject to certain limitations. Under International Law there are not many rules which can direct governments or States to grant aliens the right to work.

While Turkish law adopts the principle of equality and universality with regard to aliens' right to work, certain restrictions which have been recently imposed have compromised the application of this rule.

Both the Act on Work Permits of Foreigners[1] (Law No. 4817, dated 27 February 2003)[2] and Application Regulations of this Act[3] have attempted to resolve the issues related to aliens' right to work. Although the adoption of this Law marks a new era concerning the work permits of foreigners, there are still certain difficulties and concerns with respect to procedural practice.

The aim of this article is to analyze the conditions and limitations concerning aliens' right to work under Turkish Law, both in terms of international conventions which Turkey has ratified with effect to the basic regulations under its substantive law; to question their applicability and to address the issues in implementation and procedural complications and finally to address the amendments in the Act.

Keywords: Aliens (foreigners), right to work, work permit, work visa.

ÖZET

Pek çok ülkede çalışma hakkı bakımından yabancı ile vatandaşın eşit tutulmadığı, yabancıların çalışma hakkının bazı sınırlamalara tabi olduğu bir gerçektir. Milletlerarası hukukta da devletleri yabancılara çalışma hakkı vermesi konusunda zorlayan bir kural bulunmamaktadır.

Türk hukukunda yabancıların çalışma hakkı konusunda kural olarak eşitlik ve genellik ilkesi kabul edilmiş olsa da, getirilen pek çok sınırlama ile bu ilkeden oldukça uzaklaşılmıştır.

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1 Hereinafter referred as "AWPF."

2 Official Gazette (hereinafter refered as OG.) March 06, 2003-25040.

3 OG. August 29, 2003-25214, hereinafter referred as "AR."

Yabancıların çalışma hakkına ilişkin sorunlar, Yabancıların Çalışma İzinleri Hakkında Kanun ve bu kanunun Uygulama Yönetmeliği hükümleri çerçevesinde giderilmeye çalışılır. Bu Kanunun kabul edilmesi ile yabancıların Türkiye'de çalışma izinleri ile ilgili işlemlerde yeni bir döneme girildiği söylenebilirse de, uygulamada halen bazı aksaklıklar görülmektedir.

Bu makalenin amacı, Türk hukukunda yabancıların çalışma hakkına ilişkin koşulları ve kısıtlamaları Türkiye'nin taraf olduğu temel milletlerarası sözleşmeler ve maddi hukukundaki temel düzenlemeler çerçevesinde incelemek, uygulanabilirliğini sorgulamak, konu ile ilgili uygulamada karşılaşılan sorunlara dikkat çekmek ve son olarak Kanunda yapılması gereken değişiklikleri işaret etmektir.

Anahtar Kelimeler: Yabancı, çalışma hakkı, çalışma izni, çalışma vizesi.

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I. DESCRIPTION OF ALIEN UNDER TURKISH LAW

The new Turkish Citizenship Law[4] adopted in 2009 defines alien as *"anyone who has no bonds with the Republic of Turkey Citizenship"* (Article 3/d). With deference to this, the lawmakers have accepted a parallel corresponding "*classical"* definition of alien, which was accepted by Institute of International Law in the Geneva Conference of 1892 and has been recognized in the Turkish legal system for many years[5] as well. According to this definition, "*alien is any person who is legally permitted to remain in a country who is not a citizen of that country."*

Per the Turkish doctrine, it is widely accepted that the scope of alien concept includes citizens of foreign states, refugees, and stateless persons, non-Turkish citizens with multiple citizenships and foreign nationals with a special status[6]. In addition to this, Çelikel points out that the concept and definition of alien includes natural persons as well as foreign partnerships and foreign associations and defines foundations as a legal entity[7].

II. LEGAL RIGHT TO WORK

The right to work is also termed and interpreted as a basic human right for people which covers the right to work, or engage in productive

4 OG. June 02, 2009- 27256.

5 For criticism of this description *see,* AYBAY, Rona: *Yönetim Hukuku ve Yönetsel Yargı Açısından 'Yabancı'nın Konumu -İnsan Hakları Hukuku Açısından Bir Yaklaşım- (Management Law and Aliens' Position under Administrative Jurisdiction -An Approach for Human Rights Law-),* 68, Danıştay Tasnif ve Yayın Bürosu Yayınları, (Classification and Publication Bureau of The Council of State Publications), V. 68, 2004, p. 155.

6 TEKİNALP, Gülören: Türk Yabancılar Hukuku (Turkish Law of Aliens), 8th ed. 2003, İstanbul, p. 6.

7 ÇELİKEL, Aysel: Yabancılar Hukuku (Law of Aliens), 14th ed. 2008, İstanbul, p. 19.

employment, which cannot be restricted[8]. As per Turkish law, the right to work as a rule of law is interpreted as a public right[9]. Denial of the right to work means denial of one's right to live and exist or right to life[10]. For this reason, the right to work should be deemed as a fundamental human right of vital importance in terms of maintaining physical and moral existence.

A. Basic Regulations in Turkish Law Regarding Right to Work

1. International Conventions

The Turkish Constitution of 1982 regulates the legal nature of international conventions. According to the Constitution, Article 90 discloses, "*International Agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. Incase of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and with domestic laws due to differences in provisions, then the provisions of international agreements shall prevail.*" As unconditionally expressed, the Constitution explicitly states that in case of a conflict between international agreements entered into force in accordance with procedures of domestic laws, the provisions of international agreements shall prevail. It also means that international conventions prevail over the Act under Turkish Law[11]. Therefore, we

8 BERKİ, O. Fazıl: Devletler Hususi Hukuku - Tabiiyet Ve Yabancılar Hukuku (Private International Law - Nationality and Immigration Law), V. 1, 1966, Ankara, p. 159.

9 Berki, *supra* 8, at 182 et al.; YILMAZ, Altuğ: Yabancıların Hukuki Durumu (The Legal Status of Aliens), 3th ed. 1963, İstanbul, p. 192; SEVİĞ, M. Raşit: Devletler Hususi Hukuku, Giriş, Vatandaşlık ve Yabancılar Hukuku (Private International Law, Introduction, Citizenship and Law of Aliens), 1983, İstanbul, p. 290 et al, (1983); TEKİNALP, Gülören: Türk Yabancılar Hukuku (Turkish Aliens Law), 1996, İstanbul, p. 113 et al; ÖZKAN, Işıl: Yabancıların Çalışma Hürriyeti ve Avrupa Topluluğunda Kişilerin Serbest Dolaşımı (Aliens' Freedom of Labor and Free Movement in the European Community), 1997, İstanbul, p. 27. For the opinion on the right to work which further creates rights and liabilities in private law relations, *see,* ÇELİKEL, Aysel & GELGEL ÖZTEKİN, Günseli: Yabancılar Hukuku (Aliens Law), 5th ed. 2009, İstanbul, p. 126. On approaching to aliens' right to work under the heading of private rights and commerce of aliens *see*, BİRSEN, Kemaleddin: Devletler Hususi Hukuku, Tabiiyet-Yabancılar Hukuku (Private International Law, Citizenship-Aliens Law), V. 1, 1936, İstanbul., p. 185 et al. For the opinion on the distinction whether the rights from which aliens benefit are a preliminary question in the conflict of laws and the right to work is one of the political rights and Constitutional rights *see*, ÖKÇÜN, Gündüz: Yabancıların Türkiye'de Çalışma Hürriyeti (Freedom of Aliens to Work in Turkey), 1962, Ankara, p. 14 et al.

10 Altuğ, *supra* 9, at 192.

11 For the history and analysis of the article of the Constitution of 1982 *see*, AYBAY, Rona: *Uluslararası Antlaşmaların Türk Hukukundaki Yeri (The Importance of International Conventions under Turkish Law),* 70 Türkiye Barolar Birliği Dergisi (Journal of Turkey Bar Association), 70-hereinafter TBBD), V. 70, 2007, pp. 187-213.

should primarily examine the related provisions of international conventions ratified by Turkey with regard to aliens' right to work.

a) The Convention Regarding Discrimination in Employment and Occupation (ILO Convention No. 111)

Turkey ratified this Convention in 1966[12], which includes provisions prohibiting discrimination in employment, occupation and was entered into force on July 19, 1968[13]. According to Article 1 of this Convention, the term "discrimination" includes any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of maintaining equality of opportunity or treatment in employment or occupation. Each member state undertakes to declare and pursue a national policy designed to promote through methods of appropriate national conditions and practice, equality of opportunity and treatment with respect to employment and occupation, with a view to eliminate any form of discrimination as per the implementation of the article; to enact such legislation and to promote such educational programs as may be calculated to secure the acceptance and observance of the policy; to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy as per article 3.

As stated above, the Convention restricts any inequality based on national origin in the form of discrimination and it requires states to determine policies and to enable legislation which prohibits inequality.

b) European Social Charter

Turkey ratified the revised European Social Charter[14] in the year 2007 and has accepted 91 of the revised Charter's 98 paragraphs, (it had previously ratified the 1961 Charter on November 24, 1989)[15]. According to Article 18 of this Charter, the nationals of any one of the Parties have the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals, subject to restrictions based on *"cogent economic or social reasons"*.

c) The United Nations Convention Relating to the Status of Refugees (The Geneva Convention of 1951)

12 OG. December 22, 1966-12484.
13 OG. September 2, 1967-12705
14 OG. October 14, 1989- 20312.
15 OG. April 09, 2007- 26488.

According to the Convention, ratified by Turkey in 1961[16], contracting countries are obliged to accord to refugees lawfully staying in their territory the right to engage in wage-earning gainful employment, as per Article 17; to establish commercial and also industrial companies as per Article 18 as well. In addition, contracting states should accord to refugees holding diplomas recognized by the competent authorities, treatment as favorable as possible, not less favorable than that accorded to aliens in practicing a liberal profession as per Article 19. This establishes equal protection under law as well.

2. Substantive Law

a) Turkish Constitution of 1982

The Constitution of 1982 adopts the principle of equality between citizens and aliens under Article 10. As per this Article "*all individuals are equal without any form of discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations.*"

The provisions under Articles 48, 49 and 50 of the Constitution regulate the *freedom to work and to conclude contracts*. Constitutional Article 48 secures aliens' freedom to work by stating "*Everyone has the freedom to work and conclude contracts in the field of their choice."* The article uses the word "*everyone*" and adopts the principle of equality between citizens and aliens. It means that there is no difference between citizens and aliens with respect to the right to work.

The Article 16 of the Constitution provides criteria for the restrictions on the equality principle for aliens under the provision stating "*the fundamental rights and freedoms of aliens may be restricted by law in a manner consistent with international law.*"

Customary international law places no restriction on the right of states to restrict or regulate aliens' right to work[17]. In this case, apart from international agreements stipulating rules on aliens' right to work, the only restricting element on the issue appears to be "the law". Any kind of

16 OG. September 05, 1961-10898.

17 There are no rules in international law that restricts aliens' right to work in any way or vice versa, forcing aliens to work since the aliens have the freedom to work: Ökçün, *supra* note 9, at 10.

restriction, as per Constitutional Article 16, may only be imposed by a statutory law in a manner consistent with international law[18].

b) Basic Codes and Regulations

Under Turkish law, requirements for obtaining a work permit and its duration are regulated by AWPF, which is the governing legal document in this area. Before AWPF came into force, there were over 70 different Acts and Regulations based on these laws, which directly or indirectly related to the rights of aliens to work in Turkey. In order to streamline alien's practice under employment law, to resolve further ambiguity and disorder under Turkish Law, to establish an efficient supervisory mechanism, to ensure the provision of work permits for foreigners from a single-center, to prevent unregistered alien employment, to reduce delays caused by bureaucratic procedures, to bring foreigners' (aliens') work permit in compliance with the relevant European Union standards[19], AWPF came into force, which discloses a proper framework of law defining work permit for aliens, in 2003. In addition, AR and *"Regulations on the Employment of Personnel of Foreign Nationality of Foreign Direct Investment"*[20], came into force, as well.

[18] For more information *see*, CİN, Mustafa: Yabancıların Türkiye'de Çalışma Özgürlüğü ve Sınırı (Freedom To Work and Limitations of Aliens In Turkey), 2004, p. 55 et al (Unpublished Ph.D. Dissertation, University of Istanbul, Turkey, On File With The Board of Higher Education - Center of National Dissertation).

[19] Justification of the Act is available at http://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss38m.htm. (Access date: March 02, 2010). Law No. 2007 was criticized on similar grounds while it was effective: ÇELİKEL, Aysel: *Türkiye'de Yabancıların Çalışma İzni ve Ulusal Programda Öngörülen Düzenleme (Work Permits for Aliens in Turkey and Projected Regulation in the National Program)*, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni (International Law and Private International Law Bulletin-Hereinafter MHB), V. 22(2), 2002, pp. 109-119.

[20] OG. August 29, 2003-25214. *"Key personnel of foreign nationality to be employed in special direct foreign investments and liaison office"* is included in the scope of the Regulation and this is an exception to the AWPF which generally governs work permits of aliens. There are some concessions in work permits of key personnel of foreign nationality compared to other work permits. See, ALP, Mustafa: *Yabancıların Çalışma İzinleri Hakkında Kanun (The Law on Work Permits of Foreigners),* AÜHFD (Ankara University School of Law Review), V. 53(2), 2004, pp. 33-59. For the definition of direct foreign investment and its historical development, *see,* TİRYAKİOĞLU, Bilgin: Doğrudan Yabancı Yatırımların Uluslararası Hukukta Korunması (Protection of Direct Foreign Investment in International Law), 2003, Ankara, p. 9 et al. Also *see*, ERTEN, Rıfat: *Türk Hukukunda Doğrudan Yabancı Yatırımlar (Foreign Direct Investment under Turkish Law*), Vatandaşlık, Göç, Mülteci ve Yabancılar Hukukundaki Güncel Gelişmeler - Uluslararası Sempozyum Bildirileri (Current Affairs in Citizenship and Immigration, Refugee and Aliens' Law - International Symposium Declarations), TBBD, May 2009, pp. 397-428.

Besides, various statutory laws and regulations such as the Act on Residence and Travels of the Foreigners in Turkey[21], The Passport Act[22], Act Regarding Allowing Aliens of Turkish Descent to Practice Their Professions in Public and Private Sector[23] include provisions regarding this matter. Although the Draft Law on Foreigners and International Protection[24] was sent to the Prime Ministry in January, 2011 for fulfillment of the first stage of the ratification, there are no further provisions in the Draft regulating aliens' right to work in Turkey.

B. Requirements for Aliens to Work under Turkish Law

Under the current legal arrangements, foreigners seeking employment in Turkey are required to obtain a work permit, a work visa and a residence permit before the commencement of their employment in the country.

1. Work Permit

A work permit is granted and renewed on a discretionary basis by the government authority where employment is sought. Work permits, especially in the first application, may be restricted for a certain time for agriculture, industry or service sectors for specific occupations or in administrative and geographical locality[25].

Under Turkish law, foreigners are required to acquire a work permit before starting work in Turkey independently or need to be employed by an Employer. However, in cases where national benefit requires so or due to reasons of force majeure, a work permit may be issued after the subject foreigner starts working on the condition that the related authority is notified, that the duration of work does not exceed one month and there is ministerial approval, as per article 4 of AWPF. A work permit is valid only if the necessary work visa and residence permit are available, as per Article 12 of AWPF.

21 OG. July 24, 1950- 7564. Hereinafter referred as ARTFT.

22 OG. July 24, 1950-7564.

23 OG. September 29, 1981-17473. For detailed information regarding employment of aliens of Turkish origin, *see,* SADRULEŞRAFİ, Hüseyin: *Türk Soylu Yabancıların Türkiye'de Çalışma Hakkı (Turkish Origin Aliens' Right to Work in Turkey),* Prof. Dr. Nihal Uluocak'a Armağan (A Gift to Prof. Dr. Nihal Uluocak), 1999, pp. 290-310.

24 Available at http://www.icisleri.gov.tr/default.icisleri_2.aspx?id=5851 (Access date: June 14, 2011).

25 DALDA, Yusuf Vehbi: *Türkiye'de Yabancıların Çalışma Esas ve Usulleri, Başvuru Yöntemleri, Denetim ve Avrupa Topluluğu ile Topluluk Üyesi Ülke Mevzuatları ve Uygulamada Uyum için Öneriler (Current Procedural Principles of Aliens in Turkey, Application Methods, Audit and Regulations of the European Community ,the Member States and Suggestions for Compliance in Practice*), Türk İdare Dergisi (Journal of The Turkish Administration), V. 62, 1990, pp. 55-81.

a) Application

Applications for work permit may be filed with representations of the Republic of Turkey abroad or directly to the Ministry of Labor and Social Security domestically, as per article 4 of AP.

For the applications to be filed abroad foreigners should apply abroad for their work permit at the mission of the Republic of Turkey or the non immigrant consulate section in the country of their nationality or their permanent residence. The mission and the consulate further sends these applications directly to the Ministry of Labor and Social Security along with their probable assessments related to the request for work permit.

The documents requested during the application should be submitted to the Ministry by the employer of the foreigner. The work permits received in this manner are valid from the date the foreign national enters the country as per Article 6 of AR.

Domestically, applications may be filed directly to the Ministry by foreigners, who have obtained a residence permit for at least a six (6) months duration and the term of the residence permit has not been terminated. Foreigners who have residence permit in Turkey for at least six (6) months and their employers can apply to the Ministry of Labor and Social Security directly before this period expires as per article 7 of AR.

Applications made in accordance with procedures, provides full and complete documents that are available, which is generally answered by the Ministry within thirty (30) days as per article 12 of AWPF.

b) Competent Authority

Work permits shall be granted by the Ministry of Labor and Social Security in written form as per article 5 of AR. Decisions regarding work permit applications made from abroad are notified to the right Turkish diplomatic representatives. The results of domestic applications are notified to the applicants or their employers.

c) Rejection of Request for Permit

The requests for work permit or work permit extension are rejected under the following conditions:

As per Article 14 of AWPF, if the status in the business market and the developments in different sectors including change in economic circumstances related to employment, which are not suitable for granting

a work permit; or if any person is found during the application of work permit, featuring the same qualities and educational requirements to perform the work which a Turkish national can do and easily perform; if the foreigner does not hold a valid residence permit; if any foreigner, whose permit application for a worksite, operation or profession has been rejected, files a new application for the same worksite, operation or the same profession prior to the lapse of one year from the date the application for permit has been rejected; if the work of the foreigner constitutes a threat for national security, public order, general security and against public benefit, general ethics and general healthcare laws.

d) Term

The period of the work permit may not be longer than the employment contract or the job's term, taking also into consideration the terms related to the granting and extension of work permits as stipulated in the Act and the Regulations based on Article 19 of AR.

e) Types

There are four kinds of work permit in Turkey: Periodical, Permanent (indefinite period), Independent and Exceptional category work permit. For each work permit, there are different requirements specified under Turkish Law.

i) Periodical work permit

The Periodical Work Permit is granted for work at worksite or establishment for a certain profession can be valid for maximum period of one (1) year, taking into consideration the status of the business market, development in different sectors and economic changes related to employment, in accordance with the validity term of the foreigner's residence permit as well as the validity term of the employment contract and job duties as per Article 5 of AWPF. Periodical work permit, as a rule is the type of work permit granted to the foreigners who will work in Turkey for the first time.

The spouse and dependent children of any foreigners can come to Turkey for work purposes, accompanied by the foreigner or can come later and can be granted a work permit, restricted under the terms that they reside with the foreigner legally and uninterruptedly for at least five years as per Article 5/4 of AWPF. The Draft of AWPF is possibly going to be repealed so it will become possible for the spouse and the children of

foreigners to get work permits for a definite period without meeting the condition of residing for a period of five (5) years with the foreigner.

ii) Permanent (indefinite period) work permit

The Permanent Work Permit may be granted for any foreigner who has been residing in Turkey legally for an uninterrupted time period of at least eight (8) years or who qualifies for a total legal working period of six (6) years, without restrictions on the work permit for certain operations and professions, civil or geographical area, and without taking into consideration the status of the business market and the developments in working economic life as per Article 6 of AWPF.

iii) Independent work permit

Foreigners who shall work independently may be granted an independent work permit by the Ministry under the condition that they have legally resided without any interruption in Turkey for at least a period of five (5) years as per Article 7 of AWPF.

Foreigners being self employed, notwithstanding the option that they employ other persons which is regarded as an '*independent worker or independent contractors*' as per Article 3 of AWPF. According to this provision as example a foreigner running a B&B (bed and breakfast) on their own behalf and account is accepted as an *independent worker*, even if they do not employ other persons.

The independent work permit may be granted under the condition that the foreigners have resided in Turkey legally without interruption for a period of at least five (5) years; that their activities create an added value in terms of economic growth and have a positive influence on employment. For the purpose of being taken into consideration while evaluating the independent work permit, the documents evidencing the contribution of the foreigner's activities to the national economy and that the foreigner has sufficient income for the activity to perform as per Articles 36 through 40 of AR. This legal arrangement are clearly contrary to the provision of the Constitution stating that the fundamental rights and freedoms of aliens may be restricted by 'law' in a manner consistent with international law. Since this provision forbids the foreigners to work or to assert any right in support of it. For example, in 2011, a German family came to Antalya to run a business of salon, offering to do manicure and pedicure which is not common in Turkey but the German women could not get a work permit since she has not been a resident in Turkey for five (5) years. As a result, she and her family had to return to

Germany. Turkish society and government is conservative in terms of approach and professional standing of foreigners because public opinion is that the Government opens the door with different opportunities in different work professional practice areas but since it can affect the jobs of Turkish citizens, the Government still continues to restrict practice in select professional group and practice areas. Therefore, the current primitive laws in effect need to be amended.

iv) Exceptional work permit

In Turkish Law, the groups who may be granted exceptional work permits are not exempt from the work permit procedure but they exempted from the requirement to reside in Turkey for a certain period of time. For this reason, it is difficult to accept the exceptional category work permit as a particular exception.

The provision of the Article 8 of AWPF governs the group of people who can get exceptional work permit. As per this Article, foreigners who are married to Turkish citizens and who are living with their spouses in Turkey under marital union are eligible or Foreigners who have been settled in Turkey based on conjugal rights have terminated it after a period of at least three (3) years even if they have children through the wedlock from the Turkish spouse[26] are eligible,

Foreigners who have lost their Turkish citizenship,

Foreigners who were born in Turkey and foreigners, who have come to Turkey before having reached age of majority, are eligible,

Foreigners who are regarded as immigrants, refugees by Settlement Law No: 510 are eligible, European Union citizens and their spouses and children are eligible[27],

Employees working at the service of the diplomats, administrative and technical personnel's assigned at embassies and consulates of foreign states and representatives of international establishments in Turkey are eligible, and spouses and children of diplomats, administrative and

[26] For more information, *see,* ÇELİKEL, Aysel: *Türk Vatandaşları ile Evli Yabancıların Türkiye'deki Hukuksal Konumu (Legal Status of Foreigners Married to Turkish Citizens in Turkey)*, Prof. Dr. Nihal Uluocak'a Armağan (A Gift To Prof. Dr. Nihal Uluocak), 1999, p. 33 et al; GÜVEN, Pelin & ÇALIŞKAN, Yusuf: *Yabancıların Türkiye'de Çalışma İzinleri Hakkında Kanun ile Getirilen Yeni Değişiklikler (The New Amendments Introducedin the Law on Work Permits of Foreigners in Turkey),* Prof. Dr. Aydın Aybay'a Armağan (A Gift To Prof. Dr. Aydın Aybay), 2004, p. 221 et al.

[27] For exceptional work permit of EU citizens, *see*, ALP, *supra* note 20, at 48-52.

technical personnel assigned at embassies and consulates of foreign states and representatives of international establishments in Turkey are eligible,

Foreigners, who come to Turkey for scientific and cultural activities that will continue for more than one (1) month and sports activities that will continue for more than four (4) months, are eligible,

Foreigners who have a very important status, who will be employed by the ministries and public authorities and organizations authorized by law may be granted exceptional work permits, notwithstanding the durations stipulated by this Act.

As seen above, the current Act considers some groups of people as a separate category –due to certain qualifications and provides them convenience and relaxes it although it does not grant full exemption from work permit procedures. The exception is about that these groups of foreigners do not have to follow the time limitation. For example, they do not have to wait for five (5) years to get an independent work permit or as long as their marriage is continues with a Turkish citizen, a work permit can be easily attained.

f) Exemption

36 Under the AWPF, certain persons are held exempt from obtaining a work permit while most foreigners are required to obtain a work permit prior to their employment in Turkey as per Article 2 of AWPF. (The Law also reserves the rights granted to foreigners by bilateral and multilateral treaties to which Turkey is a party).

The Law excludes foreigners who are Turkish citizens by birth but have lost their citizenship; foreign press members working in accordance with the press law; foreigners employed or permitted to work by Ministries and state economic enterprises pursuant to specific laws; and foreigners exempted from work permit requirements in accordance with the reciprocity rule, provisions of international law or European Union legislation[28]. With this provision, The Ministry of Labor and Social

[28] Besides this regulation in the Law, there is also a provision under the heading of *"Exclusions"* in article 55 of AR. Accordingly, those specified and referenced in the contracts to which Turkey is a party and has ratified it, the aliens who come to Turkey temporarily for scientific, cultural and artistic activities as oppose to those who come for purposes of training, installation, maintenance or use of the imported machines, those who will work at fairs and circuses, scholars visiting Turkish universities to contribute their knowledge and experience, students who wish to do an internship within the framework of student exchange programs, those who will participate in national or international projects, representatives of tour operators, foreign football players are not required to obtain a work permit.

Security has authority to exempt certain foreigners from work permit requirements, taking into consideration social and economic conditions and developments in international affairs[29].

2. Work Visa

Work visa is a type of visa that is not actually defined as a requirement under either the Passport Act or AWPF. However, it is accepted as a requirement under the AWPF and it refers to work visa. For example, Article 12 of AWPF states that "*work permit is valid only if the necessary work visa and residence permit are available."* Therefore, in order to legally work in Turkey, foreigners must obtain a work visa, together with other requirements. According to the same article, foreigners who have work permit are required to apply for entry visa within ninety (90) days following the date they receive the work permit. Once informed of a positive decision, the passport is stamped with the appropriate visa with a special annotation stating that visa is granted for work purposes. In addition, foreigners must apply to the Ministry of the Interior for a residence permit within thirty (30) days following their entry to Turkey.

Work visa is a type of visa obtained from Turkish Embassies/Consulates abroad prior to arrival, which is given as an entry visa with a special annotation on the visa stamp indicating that the visa is given for work purposes. Although the consul at the diplomatic or consular representation is the competent authority to issue a work visa, sometimes the consular post may have to consult with the Ministry of Interior and relevant authorities before a visa is granted[30].

Issuance of a work visa does not directly grant the right to work or reside in Turkey; it only allows the holder to enter the country for business purposes. In this sense, work visa serves as a legal mechanism of control and supervision on the entry of foreigners to the country[31].

3. Residence Permit

Another requirement for aliens to work in Turkey is residence permit. Foreigners on a work permit are required to apply to the Ministry of the Interior for a residence permit within thirty (30) days following their entry to Turkey as per Article 12/1 of AWPF.

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29 ÇİÇEKLİ, Bülent: Yabancıların Çalışma İzinleri (Foreigners' Work Permits), 2004, Ankara, p. 128.

30 ÇIÇEKLI, *supra,* at 27.

31 ÇELIKEL & GELGEL, *supra* note 9, at 130.

To grant residence permit, foreigners seeking employment in Turkey are required to apply for residence permit by obtaining a valid work permit from the foreign representative offices of the Republic of Turkey abroad or the consulates of Turkey within the statutory periods complying with the factor that foreigners will work in the work place specified, and there would not be any disadvantage to accept applications of foreigners for judicial, administrative and political reasons.[32] In practice, foreigners with these conditions shall apply for residence permit by filling in the residence permit form and they shall be given *"residence permit to work"* by the Police Department after their application is processed.

The duration of residence permit to be submitted to the foreigner and alien person is determined on the grounds of procedure and is based on the agreements made with the foreign countries by considering the request of the applicant as per Article of ARTFT. The Residence Permit is valid for five (5) years as per Article 9 of ARTFT. In accordance with the reciprocity principle, this period can be extended or shortened by the Ministry of Internal Affairs by taking the opinion of the Ministry of Foreign Affairs[33].

4. Engagement of Work in Prohibited Classes For Aliens

Foreigners can engage in any kind of work in Turkey not prohibited by law, as per article 15 of the Act on Residence and Travel of the Foreigners in Turkey[34]. Although "The Law on Arts and Services Allocated for Turkish Citizens in Turkey" the Law No. 2007 dated June 11, 1932) was repealed after the AWPF was passed, entered into force, there are many special laws in force that limit the ability to work for foreigners[35].

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32 Circular Letter no. 155, Section M (4); ÇIÇEKLI, *supra* note 29, at 30.

33 Durations for residence permits, which are set forth in Article 8 and Article 9 of the Law on Residence and Travel of Foreigners in Turkey, have been based on clearer rules in practice. For detailed information, *see*, ÇIÇEKLI, *supra* 29, at 32 et al.

34 Hereinafter as referred ARTFT.

35 For more information on this subject, *see,* AŞAR**,** Aydoğan: Türk Yabancılar Mevzuatında Yabancı ve Hakları (Aliens' Rights under Turkish Foreign Legislation), 2006, Ankara, p. 145 et al; OKUR, Zeki: *Türkiye'de Yabancıların Çalışma Hakları (Aliens' Rights to Work in Turkey),* Prof. Dr. Erdoğan Moroğlu'na 65. Yaş Günü Armağanı (A Gift to Prof. Dr. Erdoğan Moroglu on his 65th Birthday), 2001, p. 940 et al.; KESER, Hakan: *Yabancıların Çalışma İzinleri Hakkında Kanun Tasarısı Işığında Türkiye'de Yabancıların Çalışma Hakkı ve Yabancı Kaçak İşçilik (Aliens' Right to Work, Foreigners and Illegal Foreign Employment in Turkey under the Light of the Draft Law on the Work Permits of Foreigners),* Kamu-İş Dergisi (Kamu-Is Journal), V. 7, 2003, pp. 329-332; ÖZDEMİR, Burhan: *Yabancı İşçilerin Türkiye'de Çalışma Hakkı (Foreign Workers' Right to Work in Turkey)*, İş Hukuku Ve İktisat Dergisi (Journal of Business Law and Economics - hereinafter TUSIH), 2000, pp. 14-18. In addition, for general information regarding professional groups and

We see that the freedom of aliens to work is restricted in Turkish law on the grounds of public health and safety and areas of public interest. In this context, foreigners are not allowed to engage in work area such as dentistry, midwifery and nursing as per Articles 30, 47 and63 of the Law on the Practice of Medicine and Medical Sciences[36], running a pharmacy as per Article 2 of the Law on Pharmacists and Pharmacies[37], running a veterinary practice as per Article 27 of the Law on Organization, Nature and Works of Veterinarian Association and Chambers[38]. Turkish citizens need to engage on a mandatory basis in above-mentioned area as a part of the business and in managerial capacity as well. However, foreigners are allowed to open private hospitals provided their managing directors are Turkish Citizens as per Article 2 of the Law on Special Hospitals Act[39].

According to Article 1 on the Law of Practicing Medicine and Medical Sciences, dated 1928, in order to practice in the medical profession, Turkish citizens are required to be a part of the practice. However, the regulation allows foreigners to work in certain areas of health sector entered into force upon publishing of the Official Gazette dated November 2, 2011. The requirement that a Turkish citizen has to engage in the medical and nursing professions was removed from the provisions adopted in the Legislative Decree No. 663 *on Organization and Duties of the Ministry of Health and Its Affiliates*[40] as per Articles 58/8 and 9 of the Legislative Decree. However, professions such as Dentistry, being a midwife, pharmacy and being a vet, involving a Turkish citizenship as a Director , shareholder and being a part of the business still remains an active condition.

In addition, foreigners may not be employed as civil servants as per Article 48 of Civil Servants Act[41], or judge or prosecutor as per Article 8 of Act on Judges and Prosecutors[42]; they may not work as advocate as

professional practice areas that foreigners can engage in *see*, ÇELIKEL & GELGEL, *supra* note 9, at 143 et al; LAÇİNER, Vedat: *Yabancılar ve Yabancı Olmayanlar-Almanya'da ve Türkiye'de Hukukî Statü (Aliens and Non-Aliens - The Legal Status in Germany and Turkey),* 227 et al, available at http://www.konrad.org.tr/Migration%20tr/211-244.pdf (Access date: July 05, 2010).

36 OG. April 14, 1928-863.

37 OG. December 24, 1953-8591.

38 OG. March 18, 1984-8661.

39 OG. June 05, 1933-2419.

40 OG. 28103 (Repeating issue November 02, 2011). Hereinafter referred to as the Legislative Decree No. 663.

41 OG. July 23, 1965-12056; however, they can be employed as contracted personnel as per Article 4 of the Civil Servant's Act.

42 OG. March 24, 1983-17971.

per Article 3 of Advocacy Law[43] or notary public as per Article 7 of Notary Law[44]. Directors of newspaper or CIO's and magazines must be Turkish citizens, if a foreigner is operating the business as per Article 7 of Press Act[45].

There are many more restrictions regulated in special laws for different professions which are prohibited for aliens to engage and setup a professional practice. For this reason, the condition of involving a "Turkish citizen" that is introduced in many professional groups indicates that the employment of foreign labor is not welcome and encouraged in many ways under Turkish law.

5. Continuing Challenges

After examining the conditions and restrictions on foreigners' right to work in the Turkish legal system in many different aspects and general terms, the inconvenience encountered in practice and gaps identified in the law can be summarized as follows.

The condition of five (5) year residency, which is introduced in order for a foreigner to reside and work in Turkey, spouse and children to engage in gainful work and employment in Turkey, and not granting a work permit during this period is a provision that is open to discussion and causes difficulties in practice. With this provision, the Legislator, which has specified in the general justification of the Act and aims to prevent unregistered alien employment, almost forces aliens to work illegally deviating from the aim. The effect on unregistered alien employment of this provision with no ground for relief is open to discussion and solution for the same.

The inconsistency for durations between indefinite work permit and residence permit is another regulation that is criticized as per the Turkish doctrine and causes difficulties in practice. Since residence permit is granted for a period of two (2) years in practice, a foreigner who has obtained an indefinite work permit encounters problems in obtaining or extending a residence permit. Unfortunately, there is no regulation on indefinite residence permit that will prevent aliens, who have an indefinite work permit to encounter such difficulties. The situation of aliens, whose indefinite residence permits expires and cannot be extended

43 OG. April 07, 1969-13168.
44 OG. February 05, 1972-14090.
45 OG. June 26, 2004-25504.

despite the fact that an indefinite work permit has been granted, which has been regulated by the current provisions of Law[46].

Termination of marriages of aliens, who are granted exceptional work permits based on marriage with Turkish citizens is a matter of concern with respect to implementation under article 8/a of AWPF. According to the Regulation, incase the marriage is terminated prior to the duration of three (3) years, which indicates that the marriage has not been realized for establishing the marital union or creates a rebuttable presumption to the effect that it invalidates the work permit under article 44 of AR. Marriage can end due to various reasons such as divorce of parties, death of one party, presumption of death or declaration of absence for a long duration of time, which could be upto five (5) years. Regardless of the reason for termination of marriage, invalidity of exceptional work permit of a foreign spouse may lead to unfair consequences. For instance, Antalya 5th Family Court terminated a marriage during the divorce case (No: 2009/1060) between a Turkish citizen and his wife was a citizen and national of Philippines. They parties got married in the year 2008 in Turkey. After a period of one (1) year marriage, the wife filed a divorce case because of being mentally disturbed, trauma, mental and physical cruelty based on serious domestic violence exercised by her husband. The wife realized based on the doctor's advice that her husband was a schizophrenic patient. During the case, she realized that if she gets divorced and the marriage ends, then her exceptional work permit is going to be canceled and it would be difficult and not possible for her to obtain a work permit and remain legally in the country. The wife also wanted to raise her daughter in Turkey with respect to the Turkish culture, values and as a result she withdrew the divorce law suit and decided to live with the schizophrenic husband until she completes three (3) years of marriage[47]. In this case, according to the explicit provision in the Law, the foreign spouse will not be able to benefit from the exceptional work permit. even though the child is a Turkish citizen. Therefore, in case of termination of marriage, an amendment in the regulation that will allow aliens to continue the use of exceptional work permits would be appropriate and necessary.

46 The Draft Law has regulated this matter and included the provision of "*the current work permit which replaces the work permit in Turkey*" (Article 27).

47 For more information regarding this matter, *see,* ÖZTÜRK, Necla: *Yabancıların Çalışma Hakkı ve Türk Vatandaşı ile Evli Yabancı Eşin Durumu (Aliens' Right to Work and Status of Foreign Spouse Married to a Turkish Citizen)*, Prof. Dr. Tuğrul Arat'a Armağan (A Gift To Prof. Dr. Tuğrul Arat), 2011, pp. 899-918.

Similarly, if the marriage terminates because of Turkish citizen's fault or if the couple have a child from the wedlock then under such eventuality the exceptional work permit should continue at all times. In Turkey, a foreign spouse who faces a similar problem usually prefers to work illegally or divorces and then enters into a fraudulent marriage to become a Turkish citizen by marriage, or as it is apparent from the case mentioned above the wife would continue with the marriage no matter what the level of suffering and abuse may be until she becomes a Turkish citizen.

The provision "*...children from Turkish citizen spouses of aliens can be granted a work permit,*" which is introduced by the same article of Law and is open to a broader interpretation. In principle, children of those married to Turkish citizens are deemed Turkish citizens in accordance with the principle of being a blood relative. This expression in Law infers that Turkish citizens are subject to the condition stipulating that a foreign alien who can obtain a work permit, which is difficult to understand, in terms of the policy based on the law.

Another issue in this regard is related to the independent work permits. The condition for foreigners to come to Turkey and work for a period of five (5) years to obtain an independent work permit is another provision which urges foreigners to work illegally. For example, if a foreign citizen decides to run a small business, they are restricted from doing it unless they have lived in Turkey for a period of at least five (5) years.

Certain professional group practices in Turkish law are only limited to Turkish citizens, and aliens cannot engage in such professional practice in different professions. There has been a rapid development of technology in this century with the facilitation of efficient transportation system, strong growth of trade and tourism in Turkey. Therefore, millions of people have chosen to go and live abroad for different reasons due to travel, trade, and migrating to Turkey or settling in other countries outside of Turkey as well. Foreigners seek to perform in their professions in the countries they move. The prohibitions factored in some professional groups in Turkish law also leads to difficulties in practice. For this reason, revoking the condition of being a Turkish citizen to engage in being a medical doctor, as expert doctors are required in Turkey from different countries in different specialties, and pursuing a nursing profession with a Degree No 663 has been justified as necessary. However, this step seems rather insufficient. Re-evaluation of the condition of being a Turkish citizen is also recommended for other

professional groups and practice areas of trade and based on Treaties signed by Turkey. Even though it is a promising development but more professional practice areas need to be open for practice to foreigners.

Undoubtedly, the restrictions on the right of foreigners to work do not constitute a contradiction with the Turkish Constitution as long as such restrictions comply with international law and are regulated by law and statutes. However, I am of a particular opinion that determination of criteria for acceptance into certain professions and adoption of the reciprocity principle would be reasonable instead of prohibition of certain professions with respect to aliens by granting Turkish citizenship and opening majority or all areas of professional practice. Turkey seeks to join the European Union, and the right to move freely by persons who are European passport holders, which is a fundamental freedom guaranteed by law, and this right includes the rights to reside and work as well and can be interpreted as a right to life too[48].

In addition, the status of foreign students studying in Turkey is also another concern that needs to be regulated by law[49]. This matter is governed by *the Regulation Regarding Foreign Students Studying in Turkey* [50] and foreign students that are prohibited from engaging in any income-generating work throughout their school life. The clause regarding foreign students, who receive postgraduate education, may work in higher educational institutions, where they conduct their research, constitutes an exception to this provision as a matter of fact (Article 10).

The issue that needs to be emphasized in conclusion is about exemption from work permits. Foreigners who are exempted from work permit are

48 For information about the status of Turkish citizens, *see,* BOZBEL, Savaş: *Türk Vatandaşlarının Avrupa Birliği Ortaklık Konseyi Kararlarından Doğan Çalışma ve Serbest Dolaşım Hakları (Avrupa Adalet Divanı Kararları Işığında ve Almanya Örneğinde*) *[The Rights of Turkish Citizens to Work and Move Freelystemed and Resulted from Council Decisions of the European Union Association (in the Light of Decisions of the European Court of Justice and the Case of Germany)*], Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi (Journal of The Faculty of Law of The Ataturk University), V. 8, 2004, pp. 351-382; YAVAŞİ, Mahmut, *Avrupa Birliğinde İş Görenlerin Serbest Dolaşımı ve Türk Tabiiyetindekiler (Freedom of Movement for Those Working in the European Union, including Turkish Citizens),* May 2004, TUSIH, V. 18, pp. 1-47.

49 However, the draft bill has organized students' right to work. Accordingly, undergraduate, graduate, post-graduate and doctorate students may work in Turkey, provided that they do not work more than twenty-four (24) hours per week (The Draft Bill 41). For information on foreign students' right to work, *see,* SARGIN, Fügen: *Türkiye'de Öğrenim Gören Yabancı Öğrencilerin Türkiye'ye Giriş, Türkiye'de İkamet Etme ve Çalışma Hakları (Foreign Students' Right to Enter, Reside and Work in Turkey),* MHB, V. 17-18, 2000, pp. 317-354.

50 OG. April 30, 1985- 18740.

defined in Law (Article 2 of AWPF) and Regulation (Article 55 of AR). However, foreigners covered by the exemption are also required to obtain work permit in practice. For example, there might be implementations contrary to the provision stating that '*foreigners staying in Turkey for show, concerts , fairs and circuses, under the condition of not exceeding six months are exempt from work permit'* as per article 55/e of AR) and aliens who are unlawfully are deported from Turkey[51].

CONCLUSION

Although the Constitution exercises equal protection and everybody enjoys equality at law irrespective of religion, language, race, gender, faith and states that the fundamental rights and freedoms of aliens can only be restricted in accordance with International Law and local laws. It is obvious that certain restrictions recently imposed on the right of aliens to work have compromised the application of this principle.

All these prohibitions regarding the right of foreigners to work in many occupational groups, which were introduced in the first year, when Turkey became a Republic. It is a promising development in terms of health professional groups, who have been removed from any restrictions but other restricted professional areas need to be open as well. The recent amendments of regulations are compliant because Turkey has ratified the international convention, which prohibits all forms of discrimination with respect to work and job duties, which applies to people at large and they are considered to have equal status as all citizens. Therefore the new amendment is complaint with all the international conventions. Also, there is no available commentary and analysis on Article 90 of the Turkish Constitution. However, alongside these positive developments in terms of the new arrangements, it is not easy to understand why only medical doctors and nursing professionals have been removed from the prohibited class of professionals, which was earlier only open to practice by Turkish citizens. There should be an explanation given by the legislative committee that why the prohibited degrees exist with other professions except nursing and being a doctor, which in my view is a violation of equal protection. In my opinion, the Act should not have banned professionals' foreigners from work and setting up practice in

[51] News story regarding the deportation of foreigners including Miss Hungary, beauty pageant (on the grounds that they had no work permit), who came to participate in a show at the 18th International Food & Beverage Trade Fair (organized by ANFAŞ) available at http://www.milliyet.com.tr/fuardaki-dansci-kizlar-sinir-disi edildi/turkiye/sondakika/19.02.2011/1354447/default.htm (Access date: June 12, 2011).

different practice areas, since the Constitution stipulates restrictions but not an absolute bar. AWPF, which was regarded as a liberal law when it was adopted in the year 2003 contains provisions that may cause difficulties in practice regarding the right of aliens to work. Some of the difficulties encountered are due to the provisions of the Law and the Regulations and legal loopholes in such provisions, and the others occur due to improper practices. For this reason, the amendments made can resolve ambiguities and issues previously specified which should be re-evaluated and regulated as a matter of Law, taking into account the principle of equality and equal protection under the Constitution. The provisions of the relevant international conventions and criteria, the European Union standards and fundamental rights of foreigners regarding employment needs to be harmonized without any further inconsistencies as well.

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