

The Anti-Dummy Law of the Philippines

What is the Anti-Dummy Law?

It is an Act to punish evasion of the laws on the nationalization of certain rights, franchises or privileges. It is Commonwealth Act No. 108, as amended

What does the Anti-Dummy Law provide with respect to the employment of aliens?

Section 2-A. "Any person, corporation, or association which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, x x x in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice, and any person who knowingly aids, assists, or abets in the planning, consummation or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise, or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos; Provided, however, That the president, managers or persons in charge of corporations, associations or partnerships violating the provisions of this section shall be criminally liable in lieu thereof: Provided, further, That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege and the property or business enjoyed or acquired in violation of the provisions of this Act: and Provided, finally, That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital such entities."

What is the purpose of Section 2-A of the Anti-Dummy Law?

Section 2-A of the Anti-Dummy Law is intended to prevent the circumvention of the nationalization laws of the country.

What is a nationalization or Filipinization law?

A nationalization law is one which limits a certain economic activity, or the exercise or enjoyment of a certain right, franchise, privilege, property or business only to Filipino citizens, or to corporations or associations at least a certain percentage of the capital of which is owned by Filipino citizens.

Give examples of nationalization or Filipinization laws.

The provisions of the Constitution limiting the disposition, exploitation, development or utilization of natural resources and the operation of public utilities to Philippine citizens, or to corporations or associations at least 60% of the capital of which is owned by the Filipino citizens, and those imposing citizenship requirements on the ownership and management of mass media, the ownership, control and administration of educational institutions, and the control of the governing body of entities engaged in commercial telecommunications. The same Filipinization policy is carried out in a number of our statutes; to mention a few, we can cite the nationalization of the retail trade and rural banking, in both of which cases the entity has to be wholly owned by Filipino citizens, and other special laws which require a minimum percentage of Filipino equity, like those regulating banking institutions, pawnshops, financing companies, the operation of atomic energy facilities, and tax-free cottage industries.

How does the Anti-Dummy Law complement these nationalization laws?

By itself, a Filipinization law does not necessarily entail restriction on the employment of aliens in the nationalized enterprise; but the Anti-Dummy Law complements these nationalization laws by nationalizing employment in these enterprises. (Universal Corn Products, Inc. v. Rice & Corn Board, prom. Aug. 17, 1967, 20 SCRA 1048.)

What is the extent of the nationalization of employment in nationalized enterprises under the Anti-Dummy Law?

The Anti-Dummy Law bans the employment of aliens in all entities engaged in nationalized activities and the ban on alien employment includes even minor or clerical or non-control positions.

In the case of, King v. Hernaez (Prom. March 31, 1962, 4 SCRA 792) the Supreme Court held that the employment of three Chinese nationals as purchaser and salesmen in a grocery business, which is required by the Retail Trade Nationalization Law to be wholly owned by Filipino citizens or Filipino entities, was a violation of the Anti-Dummy Law.

What is the rationale for the prohibition?

In the words of the Supreme Court:

"When the law says that you cannot employ an alien in any position pertaining to management, operation, administration and control, 'whether as an officer, employee, or laborer therein', it only means one thing: the employment of a person who is not a Filipino citizen even in a minor or clerical or non-control position is prohibited. The reason is obvious: to plug any loophole or close any avenue that an unscrupulous alien may resort to flout the law or defeat its purpose, for no one can deny that while one may be employed in a non-control position who apparently is harmless he may later turn out to be a mere tool to further the evil designs of the employer. It is imperative that the law be interpreted in a manner that would stave off any attempt at circumvention of this legislative purpose." (King v. Hernaez, supra)

Is the ban on employment of aliens in nationalized activities applicable to aliens already employed at the time the prohibition came into force?

Yes. The Court held in the case of Universal Corn Products, Inc. v. Rice and Corn Board, supra, that since the prohibition refers to continuance in office after the law went into effect and not before its effectivity, there is no retroactivity to the construction of the statute.

To what entities does Section 2-A of the Anti-Dummy Law apply?

As the Anti-Dummy Law now stands, the provision in Section 2-A of the said law against the employment by any person, corporation or association of an alien, who shall intervene in the management, operation, administration or control thereof, whether as officer, employee, or laborer, applies where the exercise or enjoyment of the property or of the franchise, privilege, or business engaged in by such person, corporation or association "is expressly reserved by the Constitution or the law to the citizens of the Philippines" or "corporations or associations at least 60% of the capital of which is owned by such citizens."

Why is the ban on employment of aliens applicable to partially nationalized business?

In Luzon Stevedoring Corp. v. Anti-Dummy Board (Prom. Aug. 18, 1972, 46 SCRA 474), the Supreme Court ruled that Section 2-A applies to a public utility the capital of which, by law, may be owned by aliens up to 40%. The court stated that to hold that a partially nationalized corporation or association will not be liable under said Section 2-A would be to grant more rights and greater immunities to a partially nationalized corporation or association, other than to a Filipino citizen or a completely nationalized corporation or association. "This theory offends all logic and reason which could not have been intended by Congress in

enacting R.A. No. 134 purposely fashioned to implement and strengthen the provision of C.A. No. 108."

What are completely nationalized activities?

Completely nationalized activities refer to those the exercise and enjoyment of which are expressly reserved by the Constitution and/or laws to citizens of the Philippines or to corporations or associations wholly owned by such citizens.

Give an example of a wholly nationalized activity.

Retail trade - Under R.A. No. 1180, retail trade business is limited to Filipino citizens or juridical persons with 100% Filipino capital.

What is a partially nationalized activity?

An undertaking or activity is partly nationalized, within the meaning of Section 2-A of the Anti-Dummy Law if its enjoyment or exercise is limited by the Constitution or any law to corporations or associations at least 60% of the capital of which is owned by Filipino citizens, that is to say, the minimum equity participation required to be owned by Filipinos is 60%.

Give an example of a partially nationalized activity.

Public utilities - Under Art. XIV, Section 5 of the new Constitution, the operation of a public utility is limited to Filipino citizens or to corporations or associations 60% of the capital of which is owned by Filipino citizens.

To what extent may foreign investors participate in the governing body of a partially nationalized business or industry?

As amended by P.D. No. 715, the Anti-Dummy Law now allows the election of aliens as members of the board of directors or governing body of corporations or associations engaged in partially nationalized activities, in proportion to their allowable participation or share in the capital of such entities. This decree is in line with Article 14, Section 5 of the new Constitution which provides that "the participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in the capital thereof."

May an alien be elected as a director in a wholly nationalized activity?

No.

May an alien be elected as a director in a partially nationalized business?

Yes.

What are the exceptions to the ban on alien employment?

First, where the Secretary of Justice specifically authorizes the employment of the alien as technical personnel; and second, the election of aliens as members of the board of directors or governing body of the enterprise engaged in partially nationalized activities in proportion to their allowable participation in the capital of such entities.

May an alien stockholder in a real state firm who is elected as director, pursuant to P.D. No. 715, hold any other position like president, vice-president or treasurer in said entity?

No. P.D. 715 was merely intended to give alien stockholders limited representation in the governing board in proportion to their equity, and therefore, alien directors may not hold any other position in said entity. Had the decree been intended to except alien directors from the general prohibition against the employment of aliens,

and to allow their intervention in the management of said entities as officers thereof, the proviso would have been so worded to express that purpose. (Op. of the Sec. Of Justice, No. 37, s. 1976.)

Is the authority to approve the employment of aliens, as technical personnel, in a nationalized trade, business or industry, exclusively vested in the Secretary of Justice?

No. There are other special laws, likewise authorizing the entry and employment of foreign nationals in certain nationalized areas of investment, which should be deemed exceptions to Section 2-A of the Anti-Dummy Law, in that prior authority from the Secretary of Justice need not be required for employment. Where there is a special law empowering another government office to refer to the Secretary of Justice need not be secured because the special law is deemed to prevail over the general provisions of the Anti-Dummy Law (Ops. Nos. 82 & 94, s. 1976).

Give instances where employment of a foreigner in a nationalized business trade or industry need not be authorized by the Secretary of Justice.

1. The Investment Incentives Act provides that within five years from registration of an enterprise covered by said Act, said enterprise may employ, for a maximum period of five years, foreign nationals in supervisory, technical or advisory positions not in excess of 5% of its total employment in each such category.
2. The Surigao Mineral Reservation Board is authorized by law to approve the importation of highly technical and specialized personnel and executive staff for its undertakings.
3. Under the Petroleum Act of 1949, the Director of Mines, now the Energy Development Board, is empowered to approve the employment of expatriate personnel "for executive or technical work and for all other works" selected by petroleum concessionaires.
4. The Mining Decree (P.D. No. 463) authorizes the employment of non-Filipinos for "technical and specialized work" in the exploitation and development of mining claims, with the approval of the Director of Mines.

In the above-mentioned cases, the special law, which contemplates in the first instance, the operation of enterprises engaged in nationalized activities, should be deemed to supersede the provisions of the Anti-Dummy Law, and the approval of the Secretary of Justice need not be sought.

What steps have been taken by the Department of Justice to implement P.D. No. 715, amending Section 2-A of the Anti-Dummy Law?

After the passage of P.D. No. 715, the Department of Justice promulgated Office Circular dated May 28, 1976, prescribing the procedure for filing and processing applications for employment of foreign technicians in nationalized activities. The Department has communicated with the various offices concerned, like the Central Bank, the Department of Trade, the Department of Tourism, and the Department of Labor, to invite their attention to the circular and enjoin compliance by the entities concerned.

What is the scope of term "technical personnel"?

The phrase "technical personnel" would in general include any person who has special, extraordinary or practical knowledge, especially of a mechanical or scientific occupation.

The Department of Commerce and Industry, which recommends the employment of foreign technicians in retail business, including restaurants, defined the term in 1963 to include "any person who possesses extraordinary or special skill or knowledge having to do with the practical, industrial, or mechanical arts or services." Pursuant to this definition, the entry and employment of foreign personnel as culinary technicians in local restaurants have been approved in the past.

How does the Department of Justice determine whether a particular position applied for would be considered technical in nature?

Pursuant to the above-mentioned Office Circular, each application for employment is referred to the office concerned - for example, in the case of banking institutions, the office having supervisory jurisdiction is the Central Bank - for comment and recommendation as to whether the particular position applied for in the light of the duties involved, and the qualifications therefore, may be considered technical in nature. The Department of Justice has to rely on the judgment of the government agency concerned as to whether a particular position is technical in nature, and rely heavily upon the recommendations it receives, since these

agencies would be more cognizant of the manpower resources and needs of the industry, or of the given economic activity.

Would the designation that a position is technical, for example, that of a "technical consultant", be controlling?

No. An evaluation has to be made as to whether the duties require expertise of a technical nature. Also, the description of duties and the justification for the employment of an alien technician, being self-serving, are only persuasive. Hence, the need to refer it to the Office concerned, which is more knowledgeable as to the needs of the business in question.

What is the procedure for filing an application for specific authorization of the Secretary of Justice for the employment of an alien as technical personnel?

As provided in Office Circular dated 28 May 1976:

1. The application shall be accomplished in the prescribed form, shall be under oath and shall be filed (in five copies) by the employer in behalf of the prospective alien-employee with the Department of Justice, Manila.
2. To be attached to the application are:
 - a. A certified true copy of the written contract of employment or appointment;
 - b. Certified true copies of the written undertaking to train at least two Filipino understudies in the technical skills for which employment of the foreign national is required.
 - c. Identification papers of the prospective alien-employee, his/her curriculum vitae and/or certification by his/her previous employer regarding his/her expertise;
3. Papers relating to the business of the prospective employer, such as Articles of Incorporation and certificate of registration; and
4. Alien-employee's employment permit or certification from the Department of Labor regarding the non-availability of local technicians for the positions to be filled. The application, together with all the supporting papers, shall be referred to the appropriate government office for comment and recommendation.

Give some rulings of the Secretary of Justice on the employment of aliens in entities engaged in wholly or partly nationalized activities:

a. An alien may continue as director of a mining firm provided he is an equity participant in said entity. This is specifically sanctioned by the latest amendment to the Anti-Dummy Law (C.A. No. 108, as amended by P.D. No. 715)

However, his election as president of said firm would violate the Anti-Dummy Law.

His employment as a technical consultant requires the approval of the Director of Mines in accordance with P.D. No. 463 which empowers the Director of Mines to approve the employment of non-Filipinos for "technical or specialized work" (Op. No. 86, s. 1976.)

b. The Secretary of Justice does not issue clearance for the termination of the services of alien technicians already employed in a nationalized business or activity.

Under Section 2-A of the Anti-Dummy Law (C.A. No. 108) as last amended by P.D. No. 715, the authority vested in the Secretary of Justice refers only to the granting of permission for the employment of alien technicians in a nationalized trade, business or activity and does not include the issuance of clearances for the termination of the services of alien technicians already employed in a nationalized business activity (Op. No. 91, s. 1976.)

c. An alien may continue as a director but not as treasurer of a mining company (Op. No. 92, s. 1976.)

d. Producing and supplying of transit mix and asphalted concrete and engaging in the construction of infrastructure and similar projects are not nationalized activities. However, the extraction of sand and gravel from river beds, creeks, streams and other public waters is a nationalized activity whether the same be undertaken by the holder of permits issued by the Bureau of Mines or by those who enter into so-called purchase agreements with such permit holders. Therefore, aliens may be employed by the company only upon specific authorization by the Secretary of Justice (Op. No. 93, s. 1976.)

e. If the alien technical personnel will be employed by a logging concessionaire, permission will have to be secured from the Secretary of Justice pursuant to the Anti-Dummy Law. Where, however, the alien is to be

hired by a service contractor for its operation under a contract for financial, technical, management or other forms of assistance, duly approved by the Secretary of Natural Resources, no prior approval of the Secretary of Justice need be obtained (Op. No. 138, s. 1976.)

f. Employment of alien technical personnel (resident manager and exploration manager, drilling supervisor/instructor) actively participating in the operation and drilling activities of the mining projects of a local mining company, although remaining as employee of a foreign owned company, required the approval of the Director of Mines pursuant to Section 60 of P.D. No. 463 (Op. No. 143, s. 176.)

g. Employment of alien consultant/employee in a company that operates a logging concession as well as plywood and wood-working plants require the specific authorization of the Secretary of Justice (Op. No. 161, s. 1976.)

h. Corporations engaged in the business of both international and domestic telecommunications are covered by the provisions of the Constitution nationalizing the operation of public utilities (Art. XIV, Sec. 5) and therefore Section 2-A of the Anti-Dummy Law barring the employment of aliens in nationalized enterprises is applicable (Op. No. 191, s. 1976.)

i. Activities undertaken pursuant to service contracts entered into pursuant to the Constitution and special laws are not nationalized. (Ops. Nos. 57, 75, 84 & 138 s. 1976). The new Constitution expressly recognizes the validity of service contracts entered into by virtue of a special law, with a foreign person or entity, for financial, technical, management or other forms of assistance for exploitation, development, exploration or utilization of any of the natural resources. In line with the new Constitutional provision, service contracts with foreigners are now authorized under specific presidential decrees for oil exploration, mining, forestry and the development of public lands

Ref.: <http://www.philippine-portal.com/property-acquisition/anti-dummy-law.html>