

## Visas for Thailand 4.0 – Recommendations about SMART VISA

Control v 1.3 13 August 2018

### A. Background

1. On 17 August 2017, a submission was made to BOI, following a request at a meeting on 16 August. The general terms of a Smart Visa (based loosely on a French so-called 'Tech visa') appeared in the press on 18 August. That 17 August submission (updated in October 2017 and re-titled 'Visas for Thailand 4.0') provided background and context, assessed several foreign examples, recognized Thailand's position and recommended (in its section E) the kinds of visas needed via a number of categories.

2. In early November 2017, BOI kindly provided details of the proposed four visa types in the 'Smart Visa' family.

3. In mid-November 2017, a JFCCT submission made jointly with another chamber was done (ref v 1.5) making a number of recommendations.

4. On 15 November, BOI conducted a very useful consultative session.

5. Shortly after that session, JFCCT provided additional responses, again jointly with another chamber (ref v 1.8A).

6. On 1 February 2018 the Smart Visa was launched.

7. In July 2018, BOI requested recommendations and suggestions as part of a review of Smart Visa. This document (done early August 2018) is a joint response of JFCCT/EABC. It is submitted with the following background documents (referred to above):

- i) Visas for Thailand 4.0 – updated October 2017 (v 1.4). Note that this includes brief commentary on several other countries. In late July 2018, comments were made about the Singapore EntrePass and Personalised Employment Pass.
- ii) Commentary on initial Smart Visa proposals, v 1.5 done prior to 15 November 2017
- iii) Updated commentary and recommendations, v 1.8A done after the 15 November consultative session.

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### B. Smart Visa Basics

For ease of reference, there are four types of Smart Visa<sup>1</sup>: 'T', 'I', 'E' and 'S'.

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<sup>1</sup> Source BOI Brochure



In addition, there is a Smart 'O' category for spouses and children.

**Attractive features:**

- i) Immigration reporting annually, not every 90 days
- ii) One instrument combining visa and the right to work (no separate work permit)
- iii) Four-year duration (other than type 'S')
- iv) Broad capture addressing needs of the 10 'S' curve' industries.

**C. Commentary and Recommendations**

**1. General**

**(a) Re-statement of overall objectives**

We thought it might be useful to re-state the overall objectives from our October 2017 submission. We called this 'Visas for Thailand 4.0'

1. Attract, and encourage retention of skills and capital in tech (and tech-related) areas and sectors which are directly *and indirectly* relevant to an evolved and transformed economy. This may involve people with highly technical skills, but it may also involve those with senior executive capabilities as well as those with investment capital.
2. Allow flexibility to attract a range of interested participants:
  - a) Individuals with skills being hired into a tech enterprise or an enterprise where tech skills are needed
  - b) Individuals with skills who have not yet found employment (thus a permit attaching to the individual needs to be included)

- c) Individual entrepreneurs starting their own companies, whether or not technically skilled
  - d) Individuals with the capacity and desire to make meaningful investments in Thailand.
3. 'Engagement' or 'being hired' by a company needing technology-related services should be allowed by employment as well as by services agreement; flexibility is needed.
  4. Visas should support training and education activities, both in-house and possibly also via institutions providing courses delivered through employers. Thus, one job function which the visa should support would be training (enhancing skills transfer).
  5. Where relevant, it should be permissible for the employer or company providing the services of an individual to be a foreign company with no presence in Thailand. This situation has caused problems in the past where, for example, a globally recognized company providing technical services needs to provide services by deploying a person into Thailand. This would be via [Mode 4](#) – i.e. there is no local employer but the services cannot be provided cross border by electronic means or by mail (Mode 1).
  6. Recognise the family and allow spousal visas (e.g. Residence Permits – example France, or Singapore Dependant's Pass), and presence of children. The Smart Visa 'O' category may do this.
  7. Wherever certain kinds of skills are prioritised, take care with skill classification. JFCCT and others have long recommended use of a competency framework so that the same language or taxonomy is used by all relevant parties. A tech visa should be neutral or 'technology agnostic', supporting policy flexibility for targeting specific skills from time to time. On a separate but related point, we have also recommended against creating new skills certifications in the IT area. The STC approach of recognition rather than certification is noted; however, there are issues about the recognition process (see later).
  8. Avoid second-guessing cases mandating the use of STC to recognize talent. Where an employer has identified an individual and believes that the individual has the necessary skills, that should be sufficient. For example, some people in high tech roles have no academic qualifications or easily recognizable certifications; however, they are skilled, valuable and sought after.
  9. Avoid limitations about which companies a visa holder can be associated with. Further work may be needed to be flexible about this. The French example may be restrictive unless there is a fast means of recognizing the enterprise.
  10. Avoid confusion and complexity through unharmonised rules and policies about work permits / visas. The single instrument of a 'work visa' with no separate work permit is good, but it needs to be recognized by all relevant Ministries and government

departments, as well as having mandated legal recognition for the private sector, e.g. banks, insurers, landlords, etc.

11. Avoid micro-level rules and pre-conditions which thwart (undo) the main purpose.

Assessing various other countries' practices and recognizing the requirements of Thailand, a 'Visa for Thailand 4.0' should have these subcategories:

- a) Individual foreigners with skills being hired \*\* into a tech enterprise or an enterprise where tech skills are needed, which includes training and education functions.
- b) Individuals with senior executive capabilities
- c) Individuals with skills who have not yet found employment (thus a permit attaching to the individual needs to be included, like the Singapore PEP but with some track record of deploying relevant skills and with a much lower salary threshold). This could be a renewable, one-year visa for the initial term.
- d) Individual entrepreneurs starting their own companies: take the risk of granting the visa with a relatively low threshold, then reassess status after 6 months or one year
- e) Investors with a demonstrated capacity to invest in one or more ventures.

NOTES:

\*\*'Hired' means employed or engaged by a services agreement. This may be a personal, direct engagement or may be via engagement with a foreign company which employs or engages the individual foreigner and deploys them into Thailand (see Objectives).

In all cases, spouse and family permits should be included which, at a minimum, allow for residing in Thailand. Consideration should also be given to allowing for a working spouse. In the Singapore context, a Dependent's Pass allows work under a Letter of Consent (LOC) up to certain limits.

### (b) Strategy of SMART VISA programme

The Smart Visa programme as launched was a 'carve out'. It did not aim to change the normal method of issuing visas and work permits. The Smart Visa has some very attractive features which would surely help to reduce administrative overhead, but now a fresh view would suggest that migrating away from the 'normal' method so that the Smart Visa becomes the new normal, would help realize those advantages in all cases. This could be achieved by lowering limits and removing unnecessary steps. It could, subject to several changes, become the standard.

### (c) Scope

Are SMART VISAs limited to Science and Technology or are they more broadly within the ten 'S curve' industries? 'S curve' if interpreted broadly seems sufficient, but there should be administrative level power and flexibility to broaden as needed.

**(d) Duration**

We've generally been focused on the validity of a Smart Visa being as long as possible, but it might also increase the number of potential applicants if the minimum term was, six months rather than one-year (specifically for the "T" and "E" categories). For example, a project-based requirement for a technical expert, or even for a senior executive manager (e.g. someone helping establish a new subsidiary) for whom a 6-month Smart Visa could be an efficient and relevant vehicle.

**(e) Agency**

A third-party agency or consulting firm which provides contract technical experts to clients (in the 10 'S-curve' industries) could be the "Employer" for the purposes of a Smart Visa. As currently written, the Employer (presumably as per the Revenue Dept.'s use of the word) needs to be in one of the 10 industries. This could be adjusted to say that the ultimate beneficiary of the applicant's services needs to be in an 'S-curve' industry, but not necessarily the entity paying the person's salary.

**(f) Self-certification**

In all categories there is a third-party certification step. These are noted in all four cases (see below).

**(g) Considering Mode 4 service delivery**

This question is relevant to Smart Visa and cases where without a Smart Visa there is no possibility to get a work permit. Can the third-party employer be a foreign firm, not located in Thailand and without any local corporate presence?

Consider the case of a foreign consulting company or professional services company hired by a multinational to implement and certify that certain high-tech manufacturing or global quality control standards are being met by the company's manufacturing facility in Thailand, and to teach local staff how to maintain them. If the consultant's presence in Thailand were required for 6 months, could he or she apply for a SMART Visa? (or if not a Smart Visa, a Work Permit and non-Immigrant B visa?)

Would the overseas consulting company (which may have no presence in Thailand) be applying for the SMART Visa on behalf of the individual (or for the traditional non-Immigrant B visa and work permit)? Or would it be the local, Thai company which is using the consultant's services (even though the local company is not paying the consultant's salary; they are paying the consultant's employer – an overseas company – for his or her services here)? The latter has a problem with conflicts as shown in the specific example illustrated below.

The goal of bringing a skilled person to Thailand to support the 10 'S-curve' industries, train local staff, etc. remains the same.

A **specific example** is a Scandinavian company manufacturing complex high-end products at specification in Thailand for export. The manufacturer's ultimate customer requires a quality certificate (Quality Certificate or QC) which in the particular case can only be provided by a limited number of approved quality certifying companies. In this case a foreign company, which needs to be arms' length from the manufacturer, must provide the certificate. The work

is necessarily done by an employee of that foreign QC company (which has no corporate presence in Thailand).

It is not ideal that the only legal solution found was for the manufacturer to employ the foreign professional from the QC company. This resulted in a lengthy and expensive contract to minimize the obvious potential conflict and possible consequences due to such conflict.

We have heard of (but cannot confirm) a general practice that an accounting or law firm would provide an employment service in similar cases. In the specific example, such possible methods were not used.

Thus, there needs to be a way to provide for this situation either via the Smart Visa or existing methods involving a Work Permit.

Note: The above description about Mode 4 focuses on the Smart Visa (and ordinary Non-Immigrant B visa + WP issues) and does not consider tax issues.

#### (h) EEC or Smart Visa?

As noted, eliminating the need for a separate work permit, and the change from 90 day to one year reporting are very much welcome.

We understand that for the Smart Visa, families are treated the same way as BOI-promoted expats, which does not itself give a right to work.

Additional benefits such as the right of the spouse to work, or reduced personal income tax, may attach to promotions relevant to the EEC, but a Smart Visa should not prevent those additional benefits assuming they are otherwise relevant (e.g. being in the EEC).

In all cases where those additional benefits are important, the candidate should not be forced to choose between a Smart Visa and/or being in the EEC.

We assume that unless the rule about volunteer work changes, it would still be considered work, but volunteer work would not be excluded from a spouse's activity (assuming the spouse has the right to work).

The timeframe for reporting of changes in status should allow at least 30 days, not 15. If a contract has finished, for example, the person needs time to wrap up personal life and move OR (if permissible) seek other employment in Thailand (e.g. in the "Talent" category). As their skills have already been identified and approved as being strategic and important to support Thailand's economy, why not give them the chance to continue doing that?

#### (i) Recognition

Because the Smart Visa does not actually include issuance of any WP-like booklet, the private sector (e.g. banks, landlords) as well as Thai government agencies are unable to process certain administrative transactions such as opening bank accounts. It would be important to find a way in which this can be addressed.

## 2. Smart 'T' Talent

### (a) family

SMART "T" Privileges #5 allow children, at least 18 years old, to work without a work permit, while all other categories only allow a spouse to work without a work permit. Although family may be mainly for 'T' and 'E', is there a need to restrict it?

### (b) Self-certification

Please refer to original objective #8 in "Visas for Thailand 4.0" (in C 1 (a) above), "avoid second-guessing cases mandating use of STC to recognize talent. Where an employer has identified an individual and believes that the individual has the necessary skills, that should be sufficient". SMART "T" still requires "expertise... to be endorsed by a government agency". See our general point on this and the specific point:

"Employers in Thailand must be certified for being engaged in the targeted industries by a relevant government agency such as the National Innovation Agency (Public Organization) and the Digital Economy Promotion Agency"

Eliminate Qualifications #4 "Employers must be certified...in the targeted industry by a relevant government agency..." as required under Smart "T". As the 'S curve' industries are broad, we suggest trying self – certification.

"In case of employers being a government agency, the certification of being in the targeted industries shall be done by that agency".

### (c) Salary floor

Salary floor for the 'T' talent category should be 80,000 to 100,000, not 200,000. Our previously provided materials (see v 1.5 done prior to 15 November 2017; v 1.8A following 15 November 2017) explain the basis for this.

Best and brightest are often young talent for whom the market rate would likely be in the range of 100,000 – 150,000 baht per month, and a minimum in the range of 80,000 -100,000 baht would realistically also include the salaries an SME might pay for a technical expert. We understand that the level is intentionally high so as not to replace existing means of gaining a work permit and visa, but we advise that setting such a high minimum salary is most likely to defeat the entire purpose of this category (encouraging skilled foreigners to come work in Thailand) and will most likely result in very few applications.

## 3. Smart 'S' Start Up Entrepreneurs

### (a) Clarification

Please clarify SMART "S" Qualifications #4: "must receive joint venture funding or endorsed by a government agency..." The two do not seem to have any connection. "Start-Up is not about seeking funding", then joint venture funding is irrelevant.

**(b) Need for an incubation certificate**

A big question for the Smart Visa – Start-up is the ***Incubation Project Certificate***

Having considered the proposed process and objectives, we wonder if an Incubation Project Certificate as currently proposed is necessary.

Most foreign entrepreneurs entering Thailand, or those we would like to attract, are experienced and use their own capital for initial funding. They would have little or no interest in entering an incubator program. Thus, the appropriateness of having such an Incubation Project Certificate as a requirement should be further examined.

As we understand it, the Ministry of Science and Technology will determine that the activity is in one or more of the ten ‘S curve’ fields. The fields are broadly drawn.

The approval process for Smart Visa - Start Up is not about seeking funding. Rather it is about ensuring that a start up proposal is genuine. Sufficient funds for personal support (the upfront THB 600,000 - see below) need to be shown and a company needs to be established within one year. If the company already exists, the entrepreneur needs some involvement – e.g. 25% equity or by being a director. Progress reports need to be shown.

The visa is only for one year initially and can be extended up to 4 years.

Does the involvement of another agency really add value to the process?

**(c) What are the criteria used** by the National Start-up Committee to determine which parties are to be granted authority to issue an Incubation Project Certificate? Does the certifying organization have to currently operate an incubator program or an accelerator, or offer a funding program for start-ups? Would the National Start-up Committee designate private interests to issue Incubation Project Certificates? Are there potential conflicts of interest that could develop for those entities with the authority to issue Incubation Project Certificates, such as a current operator of an incubation program or an agency with a funding program for start-ups?

One designated body is the NIA, so for example (and this may also apply to others), the NIA has both a fund and incubator; would it leave open a perceived conflict of interest if it were to recognize or validate a fund? Software Park Thailand has operated an incubator programme for several years but does not have a fund. DEPA announced in 2017 a new funding program for start-ups but has no incubator.

Therefore, ***what are the criteria to be used by a designated agency*** in issuing an Incubation Project Certificate? Is this intended to be a type of filter to determine that the applicant has a good chance of success or to remove certain activities from consideration? Will the agency have any ongoing role? Which agency does the ongoing monitoring?

We would suggest that as the original visa is only for one year, and as it’s acceptable for this category of Smart Visa that no funding is involved, market forces and the skill of the applicant



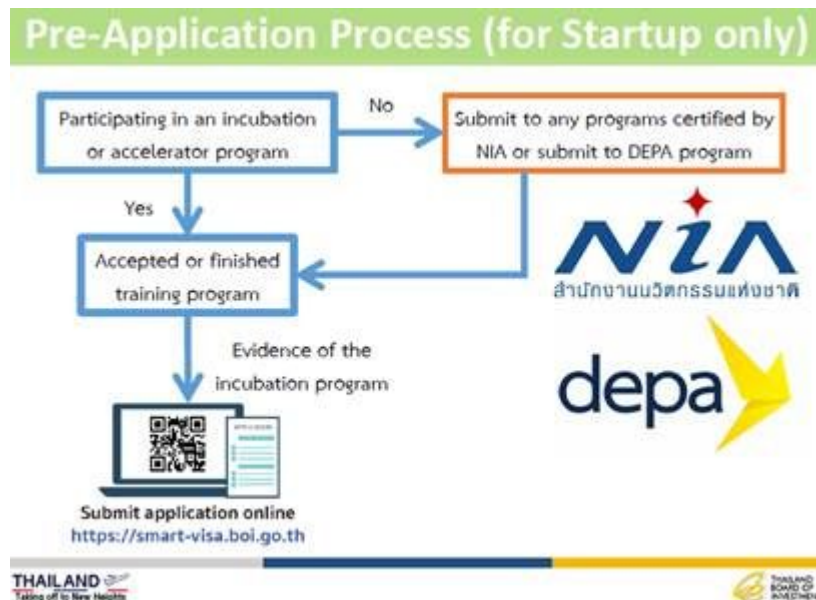
are the best determinants and the ongoing monitoring should be 'light touch', simply to see that some progress is being made.

Another question is whether the applicant is required to apply with or enter an incubation program in Thailand. If so, does the incubation program have to be public or private?

As stated earlier, the approval process for Smart Visa - Start Up is not a about seeking funding. Rather it is about ensuring that a start up proposal is genuine.

The slide 8 flowchart (pasted in below) implies that if NOT "participating", then you can "submit" to any programmes certified by the NIA (listed on slide 9) or to the DEPA programme and then if "accepted OR finished training program" (note that it's not AND finished...), you can complete the smart visa application.

How does this work? Is a business plan (or similar) only needed to be accepted by DEPA, not that you have to actually be participating in an incubator?



Certified incubation / accelerator program			
Programs	Website	Contact Person	
		Name/ Last Name	Email/ Tel
True Incube	<a href="http://www.trueincube.com/thai/en">http://www.trueincube.com/thai/en</a>	Thanasorn Jaldee	+668-1700-7473 Thanasorn.jai@truedigitalpark.com
dtac Accelerate	<a href="http://accelerate.dtac.co.th/en">http://accelerate.dtac.co.th/en</a>	Pacharee Toorakidsana	+668-3090-1110 ospacharee@dtac.co.th
BBL Innohub	<a href="https://www.bangkokbankinnohub.com">https://www.bangkokbankinnohub.com</a>	Pao Sriprasertsuk	+669-2393-9998 Pao.sri@bbl.co.th
AIS The Startup	<a href="http://www.ais.co.th/thestartup/en">http://www.ais.co.th/thestartup/en</a>	Bhornsuang Pruek-ek	+669-3514-4596 Bhornsup@ais.co.th
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Digital Venture by SCB	<a href="http://dv.co.th/en">http://dv.co.th/en</a>	Saranporn Sornpaisarn	+663-555-7666 Saranporn.s@dv.co.th
Spark Accelerator	<a href="https://spark.nia.or.th">https://spark.nia.or.th</a>	Panizara Khabuz	+662-017-5555 ext. 504 panizara@nia.or.th

We recommend streamlining and avoiding second guessing, including the removal of an Incubation Project Certificate as a requirement.

**(c) A regional thought from Chiang Mai:**

The incubation and accelerator programs do not seem attractive.

The incubation and accelerator programs are, with a few rare exceptions, not open to foreign owned companies (this may include Thai companies with a foreign Director where the Thai side appears as a proxy).

Some in Chiang Mai proposed a local committee consisting of BOI Chiang Mai, STeP/CCM, one or two leading co-working spaces and one or two community representatives against a basket of criteria:

- Working with universities
- Running training
- Contributing to community
- Developing Thai staff / interns / students
- And then joining a briefing on how to set up and do business in Thailand.

Meet three out of five criteria (or seven out of ten) and the committee approves the application. One year later evaluate, refine, continue.

The local committee would be in lieu of a certifying agency

**(d) Self-certification**

“The applicants must set up a company in Thailand within one year. The business or investment activities must be certified as being in the targeted industries by relevant government agencies such as the National Innovation Agency (Public Organization), or the Digital Economy Promotion Agency. The applicants must hold no less than 25% of the

company's shares or assume a position of a director of the company". Why not self-certification?

#### **4. Smart 'I' Investors**

##### **(a) Investment amount; multiple investee firms**

The minimum investment requirement of 20 million Baht seems excessive (and is more than the normal investment visa requirement). In the six years of early-stage funding transactions publicly recorded in Thailand there has never been an instance of a single angel investor putting that large a sum into a single entrepreneurial venture. Although the 20 million Baht is a cumulative total and allows for multiple, smaller individual investments, Investors with such significant amounts of risk capital to commit to early-stage ventures are very much inclined to invest via an angel investment group or club. Thus, this category of visa should also include foreign investors willing to invest in a Thai-based investment group in order to diversify their risk and secure equity interest in multiple start-ups, not only via direct investment in the start-ups themselves.

The change to accommodate an aggregated or cumulative total of all investments is well noted.

We suggest also keeping investors' perspectives in mind with regard to their other options. Why should a prospective investor apply for the Smart Visa when there are currently two other potentially applicable visa options: Investment Visa and Elite Visa (which does not offer a right to work)? Another point to consider is that most foreign angel investors currently prefer to invest in Thai start-ups via a registered entity of that start up in either Singapore or Hong Kong. The Smart Visa (Investor and Start-up) will likely remain less effective if the underlying reasons which result in that preference are not also adequately addressed.

Also, if already granted permanent residency, perhaps an individual could get a SMART Visa variant, without losing their PR status but enabling them to work legally (e.g. as a Director) for the company in which they are investing. If the aim is to encourage investment in the 10 sectors, why not open all avenues?

##### **(b) Self-Certification**

"The business to be set up or invested in must be certified as being the ones using technology in manufacturing or delivering services and being in the targeted industries by the relevant agencies such as the National Innovation Agency, Digital Economy Promotion Agency and the National Science and Technology Development Agency". We suggest avoiding third party doubling up.

## **5. Smart 'E' – Senior Executives**

### **(a) Experience but smarts may shorten the period**

Under SMART "E" Qualifications #2, perhaps as an alternative, we suggest reducing work experience from 10 years to 5 years to attract younger, aggressive, creative millennials, recognizing that senior executives may contribute wisdom and creativity rather than years of experience alone.

### **(b) Activity and salary floor**

Under SMART "E" Qualifications #4, additional senior management titles other than just Chairman and Managing Director would be appropriate, such as 'C' level positions - CFO, COO, CIO, CTO, etc. - and other, newer social media and tech titles, as well as EVP, SVP, SEVP.

Salary does not need to be as high as 200,000. It could usefully be 120,000 / 125,000.

### **(c) Self-certification**

"The employing companies must be certified as being the ones using technology in manufacturing or delivering services and being in the targeted industries by the relevant agencies such as the National Innovation Agency (Public Organization), Digital Economy Promotion Agency and National Science and Technology Development Agency". Again, self-certification is surely enough.

## **6. A Possible Fifth Smart Visa Needed**

As start-ups develop into more mature enterprises, an ecosystem of ongoing support for entrepreneurs becomes increasingly necessary. It would be counterproductive to force a maturing start up which has "graduated" and achieved a measure of success, to leave Thailand because there is no longer an applicable category for its initial business initiators, its talent pool, or its investors. Thus, a visa covering this aspect would be useful.

We understand that a renewal beyond the initial period (e.g. four years) is possible and that transfer from one category to another is possible assuming requirements are met.

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