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A Risky Business Accountability of Manpower Agencies in Nepal

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SUMMARY

The Foreign Employment Act 2007 (the Act) created new offenses for manpower agencies and a more stringent agency licensing system. It also created specialized mechanisms to handle violations of the Act by manpower agencies, including to compensate migrant workers for losses and to prosecute manpower agency personnel for serious violations. However, few manpower agency personnel have been prosecuted or the agencies otherwise sanctioned for harms against migrant workers, and compensation has been minimal. This is due to obstacles that prevent migrant workers from filing cases, and shortcomings in the handling of cases by government institutions. As a result, manpower agencies operate with relative impunity in Nepal, increasing the vulnerability of many Nepali men and women travelling abroad for employment.**

I. Introduction

Labor migration is a big business in Nepal, which sends the largest number of migrant workers per capita in the world. According to the World Bank, remittances from abroad total more than 25 percent of Nepal's GDP¹ and, at \$5 billion in 2013, more than 50 percent of its imports.²

Private recruitment agencies, called 'manpower agencies' in Nepal, are central players in the country's foreign employment industry.³ They connect workers with jobs abroad and negotiate the many government pre-departure requirements on workers' behalf. As of April 2013, 769 private overseas manpower agencies were licensed to

1 The World Bank. 2013. "Migrants from Developing Countries to Send Home \$414 Billion in Earnings in 2012." *The World Bank*, October 2, 2013. <http://www.worldbank.org/en/news/feature/2013/10/02/Migrants-from-developing-countries-to-send-home-414-billion-in-earnings-in-2013> [accessed May 1, 2014].

2 The World Bank. 2014. *Migration and Remittances*:

Recent Developments and Outlook. Migration and Development Brief 22. Washington, D.C.: World Bank Migration and Remittances Team, Development Prospects Group: p. 3.

3 The terms 'recruitment agencies' and 'manpower agencies' are used interchangeably in this brief.

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** This brief is taken from the 2014 report, *Migrant Workers' Access to Justice at Home: Nepal* by Sarah Paoletti, Eleanor Taylor-Nicholson, Bandita Sijapati and Bassina Farbenblum (Centre for the Study of Labour and Mobility and Open Society Foundations: Kathmandu, 2014).



Nepali Migrant Workers

Each year, more than 400,000 Nepali men and women leave Nepal to work abroad in countries other than India, primarily to the Middle East. They work on short-term contracts in mostly low-wage industries such as manufacturing and construction for men, and domestic work and other service industries for women. Thousands of others also intend to migrate, but fail to depart for various reasons, such as not being able to find a suitable position, failing a medical examination, not being able to obtain the funds to pay recruitment fees or as a result of misconduct by manpower agencies or local agents. For migrant workers to the Middle East, the maximum fee that can be charged by a recruitment agency is NPR 70,000 (approximately US\$700).^{*} This fee should include government service fees, such as payment into the welfare fund, and purchase of insurance, as well as a service fee to the agency.

^{*} Foreign Employment Promotion Board. "Costs Required for Foreign Employment." http://www.fepb.gov.np/downloadfile/lagat_1305454188.pdf [accessed May 1, 2014].

operate in Nepal,⁴ almost all headquartered in Kathmandu.

Manpower agencies have significant power over the employment and prosperity outcomes of individual workers, and certain agencies have misused this power. Some agencies have even been directly implicated in the exploitation and trafficking of migrant workers abroad. Although no comprehensive data is available, other harms are believed to be routine, such as fraud and misrepresenting the nature or conditions of the work abroad, overcharging of fees, and failing to provide required documents such as receipts for fees and recruitment and employment contracts in a timely manner. Such violations make workers more vulnerable to abuse and exploitation abroad, often leave migrant workers earning much less than was promised to them in Nepal, and trap them in cycles of debt and migration to repay debt, creating the conditions for debt bondage.

⁴ Department of Foreign Employment. "RA Name List." <http://www.dofe.gov.np/uploads/pdf/RAReport1.pdf> [accessed May 1, 2014].

Between 2012 and 2014, researchers from Nepal, Australia and the US conducted a study on the extent to which migrant workers can access justice in Nepal for the various harms that they experience in the course of migration, both routine and exceptionally severe. Justice was defined to comprise both compensation for losses, and the holding of perpetrators accountable, for example through fines, licensing sanctions, or even imprisonment. The study found that overall access to justice was extremely low, but clear potential routes to improvement exist. The full results of the study, and related recommendations, are contained in the report "*Migrant Workers' Access to Justice at Home: Nepal.*"

II. Approach and Findings of the Study

The study on migrant workers' access to justice was carried out through desk research and field research across Nepal between 2012 and 2014. It included interviews and focus groups with 54 migrant workers regarding awareness of and experiences with dispute resolution mechanisms. In addition, researchers reviewed Nepal's foreign employment policy framework, and interviewed more than 20 representatives of government, civil society, unions and the recruitment industry. The research team was also given access to a random sample of 214 cases from the offices of the Department of Foreign Employment (DoFE), and 12 cases from the Foreign Employment Tribunal (the Tribunal). Together, these sources provided information about awareness and perceptions of various justice mechanisms, as well as data on performance and outcomes.

In relation to manpower agencies, the study found that:

The Laws Governing Manpower Agencies in Nepal are Relatively Strong, at Least on Paper. The Foreign Employment Act 2007 (the Act) and the Foreign Employment Rules 2008 set out detailed obligations for manpower agencies. They also establish offenses for violations of

the Act which address many (although not all) of the harms faced by migrant workers. These include penalties for fraud, misrepresentation, overcharging, and document confiscation. Some offenses require payment of compensation to workers for resulting harms, and also attract fines and other criminal penalties.

One of the Act's most significant protections is a joint liability provision under which the manpower agency is liable if the job arranged for the migrant worker in the destination country is not what was promised, even if the worker cannot show any intent on the part of the agency to mislead the worker. In this case, the worker can recover the recruitment fees paid to the agency. Accordingly, problems such as under-payment of salary or varied work conditions are treated by the Act as reasonable business risks for which every manpower agency must assume responsibility when it sends a worker abroad.

Licensing rules and regulations are also relatively robust. They require payment of a deposit that can be used to compensate migrant workers if the recruitment agency is the subject of a later complaint, and a requirement that the recruitment agency director is of good character and has experience in the industry. DoFE has discretionary power to sanction manpower agencies that violate the Act by suspending licenses for up to six months or revoking licenses entirely.

In all, migrant workers whose rights have been violated by a recruitment agency in Nepal have a range of legal provisions on which to base complaints and seek compensation, and government has provisions through which it can punish recruiter misconduct and prevent its recurrence.

A Very Small Fraction of Potential Cases against Manpower Agencies Is Being Filed. Despite the strength of the law, very few cases appear to be reaching the forums established to investigate and adjudicate complaints. The principal institution for receiving complaints

against manpower agencies is DoFE, which has a complaints registration and investigation section. This section has been in operation since 2008 and each year the number of complaints received increases. The figure of 1,060 complaints brought against manpower companies 2012/13 is, however, extremely small in light of the number of potential claims the 400,000 migrant workers who officially depart each year likely have. The most commonly cited reasons for migrant workers not filing their cases are the following:

- **Lack of awareness of and access to the DoFE:** Interviews with migrant workers revealed a general lack of awareness about the DoFE and its complaints-receiving functions. Pre-departure orientation training contains only a brief mention of the DoFE, if any, and many migrant workers do not attend pre-departure training. Embassies do not appear to be informing workers about the DoFE claims mechanism before they return. Low awareness and access are also the result of the location of the DoFE in Kathmandu without any offices/branches outside of the capital.
- **Lack of documentation:** Manpower agencies are not providing migrant workers with all the documentation required under the Act before departure, making it difficult for workers to later file cases when they encounter problems. Not a single migrant worker interviewed had received, for example, a contract with the manpower agency, and only 17 had received an employment contract, although both are required to travel abroad.⁵ Receipts for payment of fees were also frequently not given, or workers were asked to sign receipts for less than the amount they actually paid.
- **Reliance on agents:** Informally, manpower agencies rely heavily on individual agents at the village or district level to identify

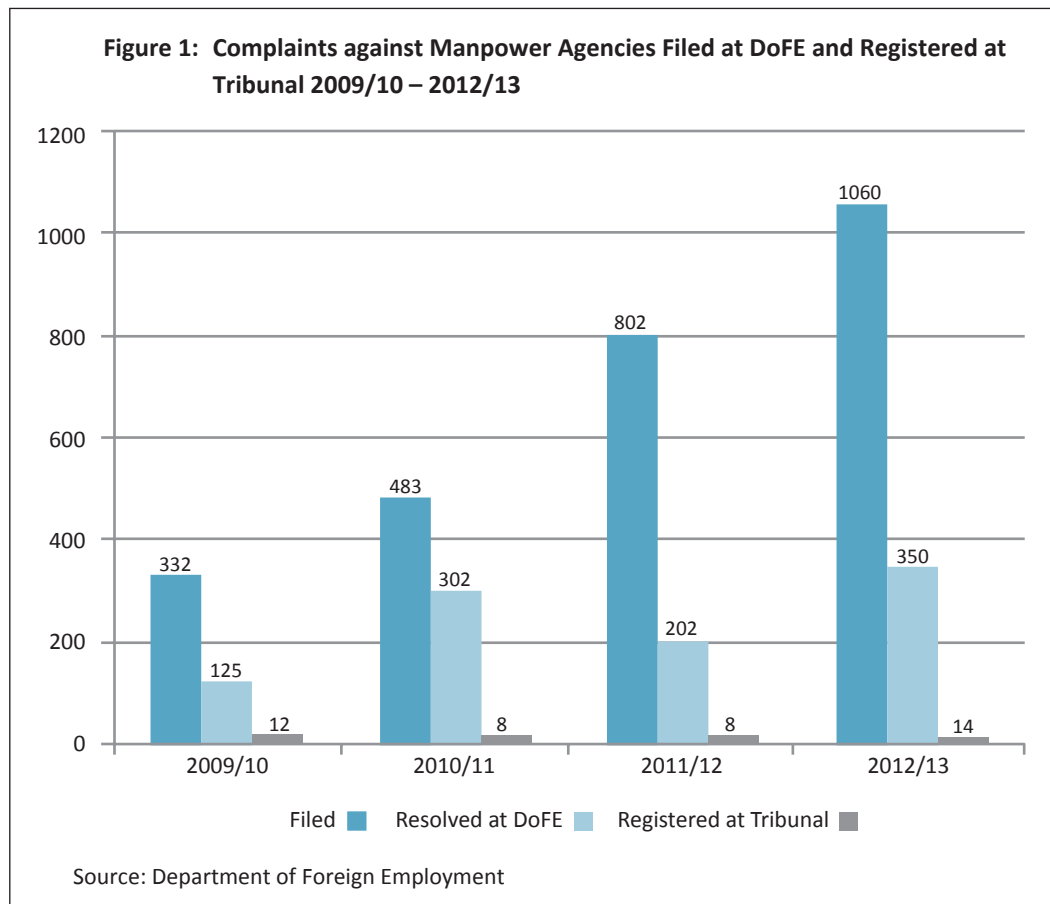
⁵ Sections 19(d) and (e), and 25 of the Act.



potential recruits and do much of the in-person arrangements with the worker. The vast majority of agents are unregistered freelance operators who receive a commission from manpower agencies for recruits and/or charge additional unsanctioned fees to the worker. Most workers interviewed blamed their agent for any harms experienced because the agent was often someone the worker knew personally and trusted. Further, many workers only knew the agent and did not know which manpower agency they were using. The use of agents effectively shields manpower agencies from liability in many cases.⁶

Complaints Rarely Result in the Prosecution of the Agency.

Manpower agency staff and directors are very rarely prosecuted as a result of complaints filed. Analysis of the law reveals that the Foreign Employment Tribunal does not have jurisdiction over the most common offenses by recruitment agencies, such as failure to comply with the contract requirements under the Act, or sending for employment that is different from and/or pays less than specified in the contract. These are instead handled administratively by DoFE. Other cases that must be prosecuted before the Tribunal are often left pending due to bureaucratic under-resourcing and ineffi-



6 For more information on the role of individual agents, see Eleanor Taylor-Nicholson, Sarah Paoletti, Bandita Sijapati and Bassina Farbenblum. 2014. *Labor Migration Agents: Regulation, Accountability and Alternatives*, CESLAM Policy Brief No. 5, Kathmandu.

ciencies. The proportion of cases registered for prosecution at the Tribunal is around one per cent of the total number of complaints filed in the same year.

Charges against Manpower Agencies Have Been Inappropriately Low, Resulting in the Weakest Possible Sanctions against Recruiters.

Certain cases can be resolved by the DoFE and are not prosecuted at the Tribunal. These include failing to advertise jobs correctly, overcharging of fees, or misleading migrant workers about the nature, conditions or type of work abroad. As the figure above indicates, the number of cases resolved at the DoFE level in 2012/2013 was around a quarter of the number of complaints filed. The sample of 202 DoFE cases reviewed by the researchers included only ten cases resolved at the DoFE level. Notably, in seven of these the least serious potential offense was charged, namely the offense of not following a rule or order, although other more serious offenses were applicable. As a result, the sanction was recorded as only a warning. In none of the cases recorded did DoFE order compensation of the victim, although it was a potential order in several of the cases.

Record-Keeping is Minimal and Frequently Faulty.

The case files reviewed in this study frequently contained errors or were missing key information such as the nature of the charges or the outcome of the case. At least five of ten case files reviewed in depth noted only 'case resolved'. Further, although DoFE publishes online which manpower agencies have had their licenses cancelled, it does not specify the reasons for the canceling of licenses. Thus it is not possible to determine whether this has been due to minor violations of the law or violations which have caused direct harm to migrant workers. The lack of record keeping is likely due to severe understaffing in the investigative unit at DoFE, but may also be attrib-

utable to lack of standardized procedures and other factors.

III. Conclusion and Recommendations for Improving Manpower Agency Accountability

Despite the clear obligations and sanctions under the Act, few manpower agencies that violate the Act are being held accountable through licensing sanctions or prosecutions. Few cases are filed and those that are filed are not prosecuted to the full extent of the law. In the event the migrant workers who were harmed receive some redress, it is in the form of compensation paid either directly by the agency or from the agency deposit. Accordingly, the authors recommend the following:

Amend the Foreign Employment Act 2007 to Stamp out Abusive Reliance on Individual Agents

- Amend the Act to include sanctions for the use of unregistered agents by manpower agencies.
- Hold manpower agencies accountable for representations made to workers by those agents regardless of whether the agent and recruitment agency have an official relationship or not.
- Create 'checkpoints' to identify relationships between agents and recruitment agencies - e.g. require a manpower agency to specify whether it used an individual agent when it applies for the labor approval sticker on behalf of the worker; require a worker to specify whether he or she used an individual agent and the identity of that agent when his/her documents are checked at the airport pre-departure.

Include Information about Rights and Redress Mechanisms in Outreach Materials

- Ensure that Migrant Resource Centers and embassies, as well as the pre-departure orientation centers provide



clear guidance about what manpower agencies can and cannot do, and how to submit a complaint to the DoFE if a worker suspects the the manpower agency is misbehaving.

- Consider undertaking the signing of employment contracts at the end of the orientation trainings in the presence of DoFE officials.

Strengthen DoFE Investigation and Resolution Procedures with Resources, Staffing and Specialized Expertise

- Increase the staffing in the Complaints Investigation Section at the DoFE to ensure that cases against manpower agencies are investigated thoroughly and in a timely manner.
- Establish a more robust inquiry process regarding systemic wrongdoing in the

recruitment industry, and transparent (and potentially mandatory) exercise of DoFE's inquiry discretion.

- Consider seconding police officers trained in financial crimes to investigate larger cases involving numerous victims.

Improve Record-Keeping, Data Collection and Transparency of DoFE Records

- Establish an electronic data management system for all complaints and case files so that charges laid against manpower agencies, and outcomes of cases can be tracked.
- Conduct regular audits of all manpower agencies, make the findings of those audits public, and develop a rating system for manpower agencies.

Centre for the Study of Labour and Mobility

The Centre for the Study of Labour and Mobility (CESLAM) is a research centre under the aegis of Social Science Baha, Kathmandu, which has the primary objective of contributing to broader theories and understandings on labour and mobility. It conducts interdisciplinary, policy-relevant research on critical issues affecting working people; serves as a forum to foster academic, policy and public debates; and provides new insights on the impact of labour and migration.

Migrant Worker Access to Justice Project (MWA2JP)

The MWA2JP is an international research collaboration between academics and experts in Australia, the United States, Indonesia and Nepal. It explores ways to strengthen legal frameworks and redress mechanisms to better protect the rights of low-wage labor migrants, in origin and destination countries.

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